87-286

No.

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

U.S. TELECOM, INC. f/k/a U.S. TELEPHONE, INC. AND U.S. TELEPHONE OF THE MIDWEST, INC.,

Petitioner,

v.

SPEAKERS OF SPORT, INC., on its own behalf and on behalf of all others similarly situated,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE FIRST DISTRICT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Federal Pre-emption

Are state law claims regarding alleged acts or omissions of telecommunications carriers in the provision of interstate telecommunications services pre-empted by the Communications Act of 1934?

Are state-law claims regarding alleged acts or omissions of interstate telecommunications carriers pre-empted by federal law where the Federal Communications Commission has reviewed the same alleged acts and omissions practices of which Respondent complains, found those alleged acts and omissions to be specifically regulated by Sections 203, 201(b) and 202(a) of the Communications Act of 1934, and has held that the Petitioner has acted reasonably and lawfully?

Primary Jurisdiction

Are state courts required under the doctrine of primary jurisdiction to defer to the Federal Communications Commission for initial determination of the reasonableness of alleged acts and omissions of telecommunications carriers in the provision of interstate telecommunications services where the alleged acts and omissions are regulated by the Communications Act of 1934?

RULE 28.1 LIST

US Telecom, Inc.

U.S. Telephone, Inc.

U.S. Telephone of the Midwest, Inc.

US Telecom - Communications Services Company

United Telecommunications, Inc.

US Sprint Communications Company, a New York General Partnership of US Telecom, Inc. and GTE Sprint Communications Corporation (a wholly -owned subsidiary of GTE Corporation).

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Certified Collateral Corp. v. MCI Telecommunications Corp., No. 84 C 388 (N.D. Ill. 1984), *dismissed sub nom., In re Long Distance Telecommunications Litigation: Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, 612 F.Supp. 892 (E.D.Mich. 1985), *appeal pending* (6th Cir. No. 85-1684) 11

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Euromarket Designs, Inc., et al. v. MCI Telecommunications Corp., No. 84-880 (D. Mass. 1984), *dismissed sub nom., In re Long Distance Telecommunications Litigation: Certified Collateral Corp., et al., v. Allnet Communications Services, Inc., et al.*, 612 F.Supp. 892 (E.D. Mich. 1985), *appeal pending* (6th Cir. No. 85-1684) 11

Feitler v. GTE-Sprint Communications Corporation, No. CV-84-759 (M.D. Pa. 1984), *dismissed sub nom., In re Long Distance Telecommunications Litigation: Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, 612 F.Supp. 892 (E.D. Mich. 1985), *appeal pending* (6th Cir. No. 85-1684) 11

Hochman, et al. v. GTE Corporation, et al., No. 83-4555 (D. N.J. 1983), *dismissed sub nom., In re Long Distance Telecommunications Litigation: Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, 612 F.Supp. 892 (E.D. Mich. 1985), *appeal pending* (6th Cir. No. 85-1684) 5, 11

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In re Long Distance Telecommunications Litigation: Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al., 612 F.Supp. 892 (E.D. Mich. 1985), *appeal pending sub nom. In re Long Distance Telecommunications Litigation: Kaplan, et al. v. ITT-US Transmission Systems, Inc. et al.* (6th Cir. No. 85-1684) 5, 7, 11

In re Long Distance Telecommunications Litigation: Lazar v. MCI Telecommunications Corp., et al., 598 F.Supp. 951 (E.D. Mich. 1984), *dismissed sub nom., In re Long Distance Telecommunications Litigation: Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, 612 F.Supp. 892 (E.D. Mich. 1985), *appeal pending* (6th Cir. No. 85-1684) 7, 11, 17

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Lee, et al. v. Western Union Telegraph Co., No. C-84-1472 TEH (N.D. Cal. 1984), *appeal dismissed*, No. 84-2383 (9th Cir. January 4, 1985). 5, 8, 11

Lee, et al. v. MCI Telecommunications Corp., No. C-84-1471 (N.D. Cal. 1984), *appeal dismissed*, No. 84-2383 (9th Cir. January 4, 1985) 5, 11

Leventhal v. GTE Corporation, No. 84-CV-602 (N.D. N.Y. 1984), *dismissed sub nom., In re Long Distance Telecommunications Litigation: Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, 612 F.Supp. 892 (E.D. Mich. 1985), *appeal pending* (6th Cir. No. 85-1684). 11

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Locks v. U.S. Telephone of the Midwest, Inc., No. 84 C 1465 (N.D. Ill. 1984), *dismissed sub nom., In re Long Distance Telecommunications Litigation: Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, 612 F.Supp. 892 (E.D. Mich. 1985), *appeal pending* (6th Cir. No. 85-1684) 4, 5, 11, 19, 22

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McIntosh Embossing, Inc. v. MCI Telecommunications Corp., No. 4-84 (D. Minn. 1984), *dismissed sub nom. , In re Long Distance Telecommunications Litigation: Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, 612 F.Supp. 892 (E.D. Mich. 1985), *appeal pending* (6th Cir. No. 85-1684). 11

Olive v. Allnet Communications Services, Inc., No 84 C 1112 (N.D. Ill. 1984), *dismissed sub nom., In re Long Distance Telecommunications Litigation: Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, 612 F.Supp. 892 (E.D. Mich. 1985), *appeal pending* (6th Cir. No. 85-1684). 11

Retail Recruiters of New York, Inc. v. MCI Telecommunications Corp., No. 83-CIV-8048 (S.D. N.Y. 1983), *appeal dismissed*, No. 84-7647 (2nd Cir. October 31, 1984). 5, 11

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U.S. TELECOM, INC. f/k/a U.S. TELEPHONE, INC. AND U.S. TELEPHONE OF THE MIDWEST, INC.,

Petitioner,

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SPEAKERS OF SPORT, INC., on its own behalf and on behalf of all others similarly situated,

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE FIRST DISTRICT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI

US Telecom, Inc., formerly known as U.S. Telephone, Inc. and U.S. Telephone of the Midwest, Inc., hereby petitions for a writ of *certiorari* to the Appellate Court of the First District of the State of Illinois to review the Illinois Appellate Court's judgment in *Speakers of Sport, Inc. v. U.S. Telephone, Inc. and U.S. Telephone of the Midwest, Inc.*, 149 Ill.App.3d 898, 501 N.E.2d 318, (1st Dist. 1986).

OPINIONS BELOW

The judgment of the Circuit Court of Cook County, Illinois is unreported. The order and transcript of judgment is reprinted as Appendix D to this petition. The opinion of the Appellate Court of the First District of the State of Illinois entitled *Speakers of Sport, Inc. v. U.S. Telephone, Inc., et al.* is reported at 149 Ill.App.3d 898, 501 N.E.2d 318 (1st Dist. 1986), and is reprinted as Appendix A to this petition. The order of the Illinois Supreme Court denying leave to appeal is reported at 114 Ill.2d 558, 508 N.E.2d 736 (1987) and is reprinted as Appendix C to this petition. The order of the Illinois Supreme Court denying leave to file a motion for reconsideration of the denial of the petition for leave to appeal is unreported and is reprinted as Appendix B to this petition.

JURISDICTION

The opinion and judgment of the Illinois Appellate Court, First District, were issued on November 21, 1986. (Appendix A, *infra.*) A timely petition for leave to appeal was filed with the Illinois Supreme Court, said petition being denied on April 15, 1987. (Appendix C, *infra.*) A timely motion for leave to file a motion for reconsideration of the denial of the petition for leave to appeal was filed with the Illinois Supreme Court, said motion being denied on May 19, 1987. (Appendix B, *infra.*) This Court has jurisdiction pursuant to 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The following federal constitutional provision and statutes, all of which are set forth in Appendix J, are involved in this case:

United States Constitution, Article VI, Clause 2;

Federal Communications Act of 1934, 47 U.S.C. Sec. 151;

Federal Communications Act of 1934, 47 U.S.C.

Sec. 201(b);

Federal Communications Act of 1934, 47 U.S.C. Sec. 202(a);

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Federal Communications Act of 1934, 47 U.S.C. Sec. 207;

Federal Communications Act of 1934, 47 U.S.C. Sec. 208;

Federal Communications Act of 1934, 47 U.S.C. Sec. 209;

Federal Communications Act of 1934, 47 U.S.C. Sec. 401(b);

Federal Communications Act of 1934, 47 U.S.C. Sec. 402(a);

Federal Communications Act of 1934, 47 U.S.C. Sec. 407;

United States Code, Title 28, Chapter 158, Sec. 2342.

The following Illinois statute, as set forth in Appendix J, is involved in this case:

Illinois Consumer Fraud and Deceptive Practices Act, Illinois Revised Statutes, 1986, Chapter 121 1/2, Sec. 262.

STATEMENT OF THE CASE

Speakers of Sport, Inc. filed a purported class action on behalf of all the customers of U.S. Telephone, Inc., and U.S. Telephone of the Midwest, Inc., (collectively now known as US Telecom, Inc. or simply US Tel) alleging that in the provision of interstate telecommunications, US Tel charged for unanswered calls in breach of the contract agreement between US Tel and its customers and that the failure to disclose these charging practices constituted a fraudulent misrepresentation by omission which violated both the Illinois Consumer Fraud and Deceptive Practices Act and the Illinois Deceptive Trade Practice Act. Appendix H. Two days later, the same complaint was filed in the United States District Court for the Northern District of Illinois *sub nom. Locks v. U.S. Telephone of the Midwest, Inc.*, District Court No. 84 C 1465, alleging the same identical charges adding only a fifth count alleging that the same acts and omissions constituted a violation of the Federal Communications Act of 1934, 47 U.S.C. Sec. 151 *et seq.* Appendix I.

These claims arose from a technical problem common to all non-AT&T interstate carriers resulting from the FCC decision to open interstate telecommunications to competition (*Specialized Common Carrier Services*, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington U.T. Commission v. F.C.C.*, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975)) and the federal court's ordered divestiture of AT&T. *United States v. American Telephone and Telegraph Company*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (Consent Decree). The local exchanges could not provide the non-AT&T companies with a feature known as answer supervision which informed the carriers as to when an interstate call was answered. The Consent Decree required the local exchanges to correct this technical deficiency by September 1, 1986. The FCC was regulating the problem during the transition.

A plethora of these class action suits were filed throughout the country alleging the same conduct against the various interstate telecommunications carriers which had initiated interstate telecommunications competition with AT&T. The Judicial Panel For Multidistrict Litigation (JPML) determined that these suits evolved from a common question of fact and ordered that all suits filed in the Federal District Courts be transferred for pretrial purposes to the Eastern District of Michigan in order to promote judicial economy and to avoid inconsistent rulings. *In re Long Distance Telecommunications Litigation*, MDL No. 598 (Appendix G)[1]. The *Locks* complaint was included

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[1] Prior to transfer, five Federal District Courts had dismissed a total of six such complaints finding that state common law and state statutory causes of action were 1) pre-empted by federal law (*Kaplan v. ITT-U.S. Transmission Systems, Inc.*, 589 F. Supp. 729 (E.D.N.Y. 1984); *Schuster, et al. v. GTE Sprint Communications Corp.*, No. C 83-5374 TEH (N.D. Cal. 1984), *appeal dismissed*, No. 84-2385 (9th Cir. January 9, 1985); *Lee, et al. v. Western Union Telegraph Co.*, No. C 84-1472 TEH (N.D. Cal. 1984), *appeal dismissed*, No. 84-2383 (9th Cir. January 9, 1985); *Lee, et al. v. MCI Telecommunications Corp.*, No. C 84-1471 TEH (N.D. Cal. 1984), *appeal dismissed*, No. 84-2383 (9th Cir. January 9, 1985)), and/or 2) that primary jurisdiction over the claims rested in the FCC (*Control Electronics, Inc., et al. v. Southern Pacific Communications Co., et al.*, No. 83-1010 (E.D. Mich. 1984), *appeal dismissed*, No. 84-1439 (6th Cir. October 30, 1984); *Hochman, et al. v. GTE Corporation, et al.*, No. 83-4555 (D.N.J. 1983); *Retail Recruiters of New York, Inc. v. MCI Telecommunications Corp.*, No. 83 Civ. 8048 (S.D.N.Y. 1983), *appeal dismissed*, No. 84-7647 (2d Cir. October 31, 1984); *Schuster, supra*; *Lee, et al. v. Western Union, supra; Lee, et al. v. MCI, supra.*)

Kaplan retained jurisdiction over federal common law claims, but these were dismissed after transfer by the JPML. *In re Long Distance Telecommunications Litigation: Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, 612 F. Supp. 892 (E.D.Mich. 1985) *appeal pending sub nom. In re Long Distance Telecommunications Litigation: Kaplan, et al. v. ITT-U.S. Transmission Systems, Inc., et al.*, (6th Cir. No. 85-1684).

in that transfer order.

US Tel moved to dismiss the instant Illinois state complaint on the alternative grounds that 1) the alleged state common law and statutory causes of action were preempted by the Federal Communications Act of 1934, 2) that the primary jurisdiction over the reasonableness of the acts and omissions alleged rested before the Federal Communications Commission, and 3) that Illinois statutes permit discretionary dismissal of a cause of action where the same cause is pending between the same parties elsewhere. The Illinois trial court granted the motion to dismiss for each of the three reasons stated and Speakers of Sport, Inc. appealed.

A similar purported class action complaint filed in Illinois on behalf of customers of Allnet Communications Services, Inc. had been dismissed by the Illinois trial court without appeal. *Discount Den, Inc. v. Allnet Communications Services, Inc.*, No. 84 CH 1059 (Cir. Ct. Cook Cty., Ill. 1984). In another such action against MCI Telecommunications Corp., the trial court denied a motion to dismiss on the same three grounds alleged by US Tel and MCI took an interlocutory appeal. *Kellerman v. MCI Telecommunications Corp.*, Nos. 82 CH 11065, 83 CH 6485, 83 CH 9919 (Cir. Ct. Cook Cty., Ill.).

Meanwhile, five Formal Complaints were filed before the FCC challenging these charges and the disclosure practices of the carriers. *Bill Correctors, Ltd. v. United States Transmission Systems, Inc., et al.*, FCC Dkt. Nos. E-84-6, E-84-11, E-84-12, E-84-13, E-84-18. The FCC recognized this to be an industry-wide problem. It held: 1) that the alleged charges were governed by the carriers' tariffs and Section 203 of the Communications Act; 2) that any billing errors were beyond the control of the carriers which had taken reasonable steps to eliminate the same; 3) that the carriers had instituted refund procedures for the billing errors; 4) that disclosure in the tariffs of the potential

errors was not necessary; and 5) that Sections 201(b) and 202(a) of the Communications Act governed the carriers non-tariff disclosures which the FCC reviewed to determine the reasonableness of disclosures to customers notifying them of potential billing errors and the procedures for refund. *Bill Correctors, Ltd. v. United States Transmission Systems, Inc. et al.*, FCC Mimeo No. 703 (Released November 8, 1984).

In the multidistrict litigation, the District Court denied a motion to remand one of the complaints which was couched only in terms of state common law and statutory law holding that the claims were governed by the Communications Act. *In re Long Distance Telecommunications Litigation: Lazar v. MCI Telecommunications Corp.*, 598 F. Supp. 951 (E.D. Mich. 1984). All of the purported class action Plaintiffs filed an amended consolidated complaint withdrawing all state grounds, alleging that the challenged billing and disclosure practices were violations of the Communications Act, of federal common law, and of the Racketeer Influenced and Corrupt Practices Act. 18 U.S.C. Sec. 1962. On the joint motion to dismiss filed by the carriers, including US Tel, the Federal District Court dismissed the amended consolidated complaint on the grounds that primary jurisdiction over the Federal Communications Act claims rested before the FCC, that the Communications Act specifically regulated the acts and omissions alleged in the complaints and therefor there was no purpose for the creation of federal common law, and that the plaintiffs failed to state a cause of action under RICO. *In re Long Distance Litigation: Certified Collateral Corp., et al. v. Allnet Communications Services Inc., et al.*, 612 F. Supp. 892 (E.D. Mich. 1985), *appeal pending sub nom. In re Long Distance Telecommunications Litigation: Kaplan, et al. v. ITT-US Transmission Systems, Inc., et al.*, (6th Cir. No. 85-1684). Subsequent complaints for alleging the same acts and omissions of the interstate telecommunications carriers continue to be filed and have been sent by

the JPML to the District Court for the Eastern District of Michigan. The District Court has dismissed those complaints on the same grounds.[2]

The Illinois Appellate Court and the Illinois Supreme Court affirmed the denial of MCI's motion to dismiss. Holding that there was a lack of authority regarding the preemptive effect of the Communications Act, the Illinois Supreme Court declined to follow the above cited federal court decisions or the FCC *Bill Correctors, Ltd.* decision on similar complaints.

> . . . (N)o Federal statute or regulation has been brought to our attention which would expressly prohibit these actions. Therefore, we find that Congress did not intend to occupy the field of interstate telephone service to the extent of barring these State-law claims for fraud, breach of contract and deceptive practices, and hold that plaintiffs' actions are not preempted.

Kellerman v. MCI, 112 Ill.2d 428, 444 (1986). *Kellerman* rejected the applicability of primary jurisdiction holding there was no need for FCC specialized or technical expertise, and further noted:

> The issue of whether defendant's failure to disclose certain charges is 'unjust or unreasonable' under Section 201(b) of the Communications Act has no relevance as to whether defendant's failure to disclose those charges constituted fraud, a breach of contract, or a violation of Illinois statutes.

Kellerman, supra, 112 Ill.2d 428, 448 (1986). This Court denied MCI's petition for *certiorari* on the interlocutory appeal. *MCI Telecommunications Corp. v. Keller-*

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[2] *In re Long Distance Telecommunications Litigation: Lee, et al. v. Western Union Telegraph Co., et al.*, 639 F. Supp. 305 (E.D. Mich. 1986) *appeal pending* (6th Cir. No. 86-1599); *In re Long Distance Telecommunications Litigation: Solomon, et al. v. MCI Telecommunications Corp., et al.*, 647 F. Supp. 78 (E.D. Mich. 1986).

man, ___ U.S. ___, 107 S.Ct. 434 (1986).

US Tel cited the related federal court decisions and the FCC's *Bill Correctors, Ltd.* decision to the Illinois Appellate Court on appeal. The Appellate Court held that *Kellerman* was controlling and reversed the judgment of dismissal.

US Tel's Petition for Leave to Appeal to the Illinois Supreme Court was denied on April 15, 1987. The day prior, the FCC dismissed the Formal Complaint filed in *Locks* against US Tel finding that the reasonableness of the carrier's charges and charging practices are no longer an open question. The FCC further reviewed US Tel's disclosures regarding the potential billing errors and refund procedures also finding them to be reasonable and lawful. *In re Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, FCC Dkt. No. E-86-66 (Released: April 14, 1987). US Tel filed a motion for leave to file a motion for reconsideration before the Illinois Supreme Court based upon the FCC's decision of *Locks*. This motion was denied on May 19, 1987.

The Illinois trial court has certified a nationwide class of MCI's customers in *Kellerman*. In a related case based on state law claims, the California state court has certified a statewide class of customers of GTE Sprint Communications Corporation in *Clothesrigger, Inc. v. GTE Corporation*, No. 515519 (Superior Ct. San Diego Cty., Cal.), with directions from the California Appellate Court to consider certification of a nationwide class. 191 Cal.App.3d 605, 236 Cal.Rptr. 605 (4th Dist. 1987) (*review denied* July 23, 1987). Another related class action complaint alleging state-law grounds has been filed in the Illinois state court, *Katz v. Allnet Communications Services, Inc.*, 87 CH 3728 (Cir. Ct. Cook Cty., Ill., 1987)

REASONS FOR GRANTING THE WRIT

This case raises in issue a vital point of federal law which this Court has not revisited in the 53 years since the passage of the Communications Act of 1934: the authority of state courts to entertain state common law and state statutory causes of action against interstate telecommunications carriers regarding charges and practices specifically regulated by the Federal Communications Commision pursuant to federal statute.

Prior to the Communications Act, this Court addressed this issue four times under the Act of 1910, which amended the Interstate Commerce Act to include all interstate communications, and universally held that state courts may not regulate through state-law claims the acts or omissions of carriers in the provision of interstate communications where those acts and omissions are regulated pursuant to the federal statute.

Despite 1) this Court's own holdings, 2) the decisions of five United States District Courts dismissing twenty-four similar complaints on the grounds of federal pre-emption and primary jurisdiction, and 3) decisions by the FCC on eleven related complaints holding the same charging and disclosure practices to be reasonable and lawful, the Illinois courts have decided that, in the absence of any ruling by this Court since the passage of the Communications Act in 1934, that they are authorized to independently determine the issue on behalf of all customers of the interstate carriers nationwide.

EFFECT ON EXISTING LITIGATION ON THE IDENTICAL ISSUE AND DECISIONS THEREON

The failure of the Court to reverse the Illinois courts will nullify the efforts of the federal courts in twenty-four related cases and eleven related FCC complaints, all of which have found that the same alleged acts or omissions of carriers in the provision of interstate communications

are regulated pursuant to the federal statute.

This case is of major importance in a telecommunications industry going through the throes of transition from monopoly to competitive interstate telecommunications. Thirty-one class action suits have been filed to date on this same contested matter.[3] Five different Federal District Courts have wrestled with the very claims in the instant case and have decided either 1) that federal law preempts state causes of action or 2) that primary jurisdiction requires referral of the instant matter to the FCC for the exercise of its administrative discretion. See Petition, p. 5, n. 1.

Given the increasing number of purported class action complaints being filed, the Judicial Panel for Multidistrict Litigation (JPML) decided that the necessities of judicial economy and consistency of ruling required that all of these related cases in the federal courts be transferred to the Eastern District of Michigan. *In re Long Distance Telecommunications Litigation*, MDL No. 598, *Transfer Order*, Appendix G. Consistent with the prior rulings, the District Court decided that state common law and statutory claims are pre-empted by federal law and that the matters alleged herein are governed by the Communications Act of 1934 (*In re Long Distance Telecommunications Litigation: Lazar v. MCI Telecommunications Corp.*, 598 F. Supp. 951 (E.D. Mich. 1984)) and require deferral to the FCC for the exercise of its administrative discretion under the doctrine of primary jurisdiction. *In re Long Distance Telecommunications Litigation: Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, 612 F. Supp. 892 (E.D. Mich. 1985), *appeal pending sub nom. In re Long Distance Telecommunications Litigation: Kaplan, et al. v. ITT-US Transmission Systems, Inc., et al.* (6th

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[3] All cases are listed in Table of Authorities under subheading "Related Cases", pp. vi-xii.

Cir. No. 85-1684).

In turn, the FCC has decided no less than eleven such complaints on two different occasions. In reviewing the initial five complaints under the title *Bill Correctors, Ltd. v. United States Transmission Systems, Inc., et al.*, FCC Mimeo No. 703 (Released November 8, 1984), the FCC stated that despite the deficiencies in the complaints, they raised industry-wide problems as to substantive practices which fell within the Commission's expertise and demanded an expeditious determination. The claims that interstate carriers were charging for uncompleted calls was directly regulated by the tariffs on file in Section 203 of the Communications Act. The Commission held that although interstate customers may occasionally be erroneously billed for uncompleted calls, these errors arise out of a technological problem known as the lack of answer supervision, that the carriers take specific measures to avoid such erroneous billings, and that the carriers do not charge for unanswered calls when notified of the error. Responding to the claim that the carriers have omitted to disclose this potential for billing errors, the Commission decided, under the discretion vested in it under Section 203 of the Communications Act, that the carriers need not make such disclosures in the filed tariffs. However, the FCC ruled that Sections 201(b) and 202(a) did require that the carriers reasonably disclose to their customers the potential for billing errors and the availability and procedure for obtaining refunds.

In a subsequent decision on the six complaints referred by the District Court, the FCC held that the charging practices of interstate carriers regarding the alleged uncompleted calls are no longer an open question. The FCC specifically reviewed the disclosure practices of US Tel, informing its customers of this potential billing error and refund rights and procedures, finding these disclosures to be reasonable and lawful as required by Section 201(b) of

the Communications Act. *In re Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, FCC Dkt. No. E-86-066 (Released: April 14, 1987).

Although the Illinois Appellate Court was presented with the FCC's decision in *Bill Correctors, Ltd., supra*, no attempt was made to reconcile or distinguish the agency's determination. The Illinois court noted only that proceeding on the state-law claims would not present an obstacle to the accomplishment of Federal policy. *Speakers of Sport, Inc. v. U.S. Telephone, Inc., et al.*, 149 Ill.App.3d 898, 501 N.E.2d 318, 321 (1st Dist. 1986) *appeal denied* 114 Ill.2d 558, 501 N.E.2d 736 (1987), *citing Kellerman, et al. v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 443-44, 493 N.E.2d 1045 (1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 434 (1986).

The challenged problems caused by the lack of answer supervision arise directly from the FCC's determination to establish the competitive provision of interstate communications to fulfill its congressional mandate of ensuring nation-wide service at reasonable rates. *Specialized Common Carrier Services*, 29 F.C.C.2d 870 (1971) *aff'd sub nom. Washington U.T. Commission v. F.C.C.*, 513 F.2d 1142 (9th Cir. 1975) *cert. denied* 423 U.S. 836 (1975); 47 U.S.C. § 151. Since then, the FCC has continuously addressed the problems arising from the lack of answer supervision as one of the telephone system's technological deficiencies in the transition from monopoly to competitive interstate services. *Exchange Network Facilities for Interstate Access (ENFIA)*, 71 F.C.C.2d 440, 454 (1979); *MTS and WATS Market Structure*, 48 Fed.Reg. 42,984, 43,001-02 (1983), *aff'd sub nom. National Association of Regulatory Utility Commissioners v. F.C.C.*, 737 F.2d 1095 (D.C. Cir. 1984). In further review of this problem, the FCC has now addressed the precise customer problems raised in the instant case: erroneous billings and disclosure of potential billing errors and of refund rights and procedures. *Bill*

Correctors, Ltd., supra; In re Certified Collateral Corp., supra. Despite the FCC's determination of these issues, the Illinois courts have ignored these rulings and proceed to make an independent review of Petitioner under the irreconcilable notion that compliance with the FCC's disclosures could be fraudulent and that charging pursuant to the tariff could be in breach of contract.

Only the granting of *certiorari* to the instant petition can prevent the Illinois courts from circumventing and undermining all of the decisions of the federal courts and the FCC since these complaints were initiated in 1983. No other state complaint is on appellate review and available by *certiorari* to this Court. Nor will any other federal decision alter the course of the Illinois courts which have expressly stated in their opinions that any federal determination of the reasonableness of the carriers' practices are irrelevent to the state-law claims alleged. *Speakers of Sport, Inc. v. U.S. Telephone, Inc., et al.*, 149 Ill.App.3d 898, 501 N.E.2d 318, 322 (1st Dist. 1986) *appeal denied* 114 Ill.2d 558, 501 N.E.2d 736 (1987); *See also Kellerman, et al. v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 493 N.E.2d 1045, 1054 (1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 434 (1986). Failure to grant *certiorari* would permit all of the federal complaints to be refiled as nationwide class actions in the State of Illinois under state law theories raising the identical challenges rejected by the federal courts and the FCC, circumventing and nullifying the uniform federal decisions on thirty-five similar complaints.

THE DECISIONS OF THE ILLINOIS COURTS ARE AT ODDS WITH ALL FOUR EARLIER DECISIONS OF THIS COURT ON SAME ISSUE

Since Congress first occupied the field of interstate communications through the passage of the Act of 1910 amending the Act to Regulate Commerce, the United States Supreme Court has four times addressed the issue of the states' attempts to decide on grounds of state statutory

or common law the duties of carriers of interstate communications subject to federal regulation.

In *Postal Telegraph-Cable Co. v. Warren-Godwin Co.*, 251 U.S. 27 (1919), the Mississippi Supreme Court decision that the federal act did not preempt state common law contract actions by a customer against the interstate carrier was reversed. This Court said that to permit state common law contract actions would wholly destroy the mandated requirements of equality and national uniformity of rates by subjecting the same to diverse and possibly conflicting state laws. 251 U.S. at 30. The assertion of Congress to bring interstate transmissions under federal control occupied the whole field to the exclusion of state action. 251 U.S. at 31.

In *Western Union Telegraph Co. v. Boegli*, 251 U.S. 315 (1920), the Indiana Supreme Court applied an Indiana statute for the negligent failure to deliver an interstate telegraph message. This Court reversed, holding that the clear purpose of Congress in assuming federal control over this area was to establish a uniform national rule leaving no room for the states to exercise their power to regulate. 251 U.S. at 316.

Further clarification of the relationship between the customer and the carrier in interstate transmissions came from Mr. Justice Brandeis in *Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U.S. 566 (1921). Esteve Bros. sued for a loss sustained due to Western Union's negligent international transmission of its message. In response to Western Union's assertion of its limitation of liability in its tariff on file with the Interstate Commerce Commission, Esteve Bros. replied that it neither knew of nor consented to such limitations and that Western Union omitted to disclose same. Based on a theory of common law contract, Esteve Bros. argued that it was not subject to such condition. Mr. Justice Brandeis noted the totality of the change affecting common law liability resulting from the federal

act:

> The Act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. Before the Act the companies had a common-law liability from which they might or might not extricate themselves according to views of policy prevailing in the several states. Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed. Assent to the terms of the rate was rendered immaterial, because when the rate is used, dissent is without effect. . . .
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> . . . The rule does not rest on upon the fiction of constructive notice. It flows from the requirement of equality and uniformity of rates laid down in (section) 3 of the Act to Regulate Commerce. Since any deviation from the lawful rate would involve either an undue preference or an unjust discrimination, a rate lawfully established must apply equally to all, whether there is knowledge of it or not. . . .

Esteve Bros. & Co., supra, 256 U.S. at 571-573.

In this Court's final pronouncement on this issue, the Alabama Supreme Court's decision that a state common law theory of gross negligence was not pre-empted by federal law was reversed with this Court again emphasizing that the common law liability and contractural restrictions subject to state laws have been superceded by federal legislation. *Western Union Telegraph Co. v. Priester*, 276 U.S. 252 (1928).

Federal regulation of interstate communications was restructured in 1934 by removing control of this area from the Interstate Commerce Commission and establishing the Federal Communications Commission to deal solely with the concerns of interstate communications. *See Benanti v. United States*, 355 U.S. 96, 104, n. 14. This reorganization was done without changing the substantive federal law on interstate communications. *See* 78 Cong. Rec. 10312-13 (Statement of Representative Rayburn, June 2, 1934).

In the fifty-three years since the passage of the Communications Act of 1934, this Court has not again addressed the issue of the states' attempts to uphold state common law and statutory causes of action against carriers of interstate communications in the face of federal regulation of the same. The Federal Circuit Court of Appeals have upheld the principles of federal pre-emption established by this Court. *O'Brien v. Western Union Telegraph Co.*, 113 F.2d 539 (1st Cir. 1940); *Ivy v. American Telephone and Telegraph Co.*, 391 F.2d 486 (2nd Cir. 1968). Consistently, the United States District Courts have followed these opinions and the fundamental principle established by this Court sixty-eight years ago. These federal courts have recognized that these same state-law claims are regulated by the Communications Act of 1934 and subject to the jurisdiction of the FCC. *In re Long Distance Telecommunications Litigation: Lazar v. MCI Telecommunications Corp., supra*, 598 F. Supp. 951 (E.D. Mich. 1984); *In re Long Distance Telecommunications Litigation: Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al., supra*, 612 F.Supp. 892 (E.D. Mich. 1985). *See also* Petition, p. 5, n. 1. The FCC itself has specifically found that these complaints are within its expertise and raise industry-wide concerns regarding charging practices and disclosure practices of interstate carriers. *Bill Correctors, Ltd., supra*, FCC Mimeo 703; *In re Certified Collateral Corp., supra*, Appendix E.

Illinois courts have attempted to ignore or distinguish these related and contrary federal decisions by stating that the issue of whether defendant's failure to disclose certain charges is "unjust or unreasonable" under Section 201(b) of the Communications Act has no relevence as to whether defendant's failure to disclose those charges constituted fraud, a breach of contract, or a violation of Illinois' statutes." *Speakers of Sport, Inc., supra*, 501 N.E.2d at 322 (1986), citing *Kellerman, supra*, 112 Ill.2d 428, 448-49 (1986). The Illinois courts have sought to avoid the consistent rulings of federal pre-emption by the labeling placed on the causes of action in terms of state common law and state statutory law.

Just last term, this Court specifically rejected the theory that pre-emption of matters subject to federal law may be avoided by the mere relabeling of those matters in terms of state common law or statutory law. *IBEW v. Hechler*, 481 U.S. ___, 107 S.Ct. ___, 95 L.Ed.2d 791 (1987).

In *Hechler*, the United States Court of Appeals for the Eleventh Circuit attempted to distinguish a pre-emption ruling by this Court in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) that the legal consequences intended to flow from breaches of a collective bargaining agreement must be resolved by reference to uniform federal law. Attempting to distinguish the complaint before it, the Eleventh Circuit held that although the employee was governed by the collective bargaining agreement, the employee's claim was essentially one of common law negligence alleging a duty of care under tort law. This Court reversed the Eleventh Circuit noting that:

> (t)he need for federal uniformity in the interpretation of contract terms therefore mandates that here, as in *Allis-Chalmers*, respondent is precluded from evading the pre-emptive force of Section 301 by casting her claim as a state-law tort action. 95 L.Ed.2d at 803.

The Illinois Appellate Court attempts to do what this

Court refused to permit in *Hechler*. A complaint identical to the instant proceedings was filed in *Locks* in the federal courts. *See* Appendix I. That complaint made its way through the federal system to the FCC which dismissed the complaint after reviewing the practices of the Petitioner, finding that the Petitioner's alleged acts and omissions were governed by the Communications Act and were reasonable and lawful. *In re Certified Collateral, supra*, Appendix E. Nevertheless, the Illinois courts attempt to relitigate that complaint solely because of the state-law labels attached by the respondent. *Certiorari* must be granted to enforce this Court's rulings that state-law labels may not circumvent the pre-emptive effect of uniform federal law.

THE RECENT REJECTION BY THE FCC OF THE SAME ALLEGATIONS PRE-EMPTS STATE-LAW CLAIMS

During the pendency of these proceedings, the identical allegations against US Tel to the instant case were rejected by the FCC. *In re Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, FCC Dkt. No. E-86-66 (Released: April 14, 1987). This decision was presented to the Illinois Supreme Court in the form of a motion for leave to file a motion for reconsideration of the denial of the petition for leave to appeal. The motion was denied. Appendix B. Nevertheless, the FCC has specifically reviewed and rejected the class allegations regarding US Tel's charging practices and regarding US Tel's disclosures to its customers, the alleged class, finding them to be reasonable and lawful. Given this determination, the Illinois courts are pre-empted from attempting to usurp the function that Congress has assigned to the federal regulatory body. United States Constitution, Article VI, Clause 2; *See Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

In *Kalo Brick*, this Court rejected the Iowa Appellate

Court's attempt to distinguish state-law claims as creating separate duties from the federal act. Noting that "the court's concern is necessarily with the nature of the activities which the states have sought to regulate, rather than the method of regulation adopted . . . ," (450 U.S. at 317-18) this Court ruled that states may not entertain state-law claims in an attempt to regulate through the threat of damages, conduct which has been approved by the federal agency. 450 U.S. at 325-6. Rejecting the argument that the savings clause permits state actions, the Court held that:

> " 'no court has jurisdiction' of a suit such as respondent's until the Commission 'has declared the practice to be . . . unjust.' (citation omitted) And the Commission, in the exercise of its discretion, has done precisely the opposite; it has decided that the (carrier's action) was proper . . . . "

450 U.S. at 330.

As in the instant case, the Commission in *Kalo Brick* did not rule until after the initiation of the state lawsuit. Nevertheless, the Court held that the state courts are bound by that determination. The Illinois courts seek to avoid the federal regulatory decision, as did the Iowa Appellate Court, and circumvent the authority vested by Congress in the FCC. Although prohibited by this Court's decisions, this usurpation can be prevented only by the granting of the instant petition.

AVOIDANCE OF PRIMARY JURISDICTION REFERRAL TO THE FCC IS LEGALLY UNSUPPORTABLE

The doctrine of primary jurisdiction requires courts to defer to administrative bodies questions involving the reasonableness of an interstate communications carrier's practices before any court proceeding. *Booth v. American Telephone and Telegraph Company*, 253 F.2d 57 (7th Cir. 1958). No court has juridiction of a suit until the Commis-

sion has declared the practice to be unjust. *See Chicago & North Western Transportation Company v. Kalo Brick & Tile Company*, 450 U.S. 311, 330 (1981). Despite the repeated application of the doctrine by the Federal District Courts in identical actions, the Illinois Appellate Court, relying upon *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), refuses to defer to the federal agency vested by Congress with the administrative discretion in this matter.

Although *Nader* involved a claim of fraudulent omission, this Court did not hold in that case that no federal agency has authority over disclosures. It held that under the Federal Aviation Act no purpose would be served by deferring that respondent's claim to the Civil Aeronautics Board. This Court found that Congress only vested the CAB with jurisdiction over the public interest and with authority to enter cease and desist orders. Congress did not vest the CAB with authority to entertain a private claim, nor to grant a private remedy. Individual consumers could not even initiate proceedings. 426 U.S. at 301-02.

In total contrast to the Federal Aviation Act, the Communications Act specifically governs Respondent's private challenges to the Petitioner's charges (47 U.S.C. Sec. 203) and disclosures (47 U.S.C. Secs. 201(b), 202(a)) as expressly found by the FCC. *Bill Correctors, Ltd. v. United States Transmission Systems, Inc., et al.*, FCC Mimeo No. 703 (Released: November 8, 1984); *In re Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, FCC Dkt. Nos. E-86-63 through 68, 2 F.C.C. Rcd. 2171 (Released: April 14, 1987). Unlike the Federal Aviation Act, Congress provided for the FCC to entertain private complaints, (47 U.S.C. Secs. 207, 208), for the award of damages (47 U.S.C. Secs. 206, 209), for enforcement of its orders, (47 U.S.C. Sec. 401(b)), and for appellate review of its decisions. 47 U.S.C. Secs. 402(a), 407; 28 U.S.C. Sec. 2342. Furthermore, the FCC is vested with the administrative discretion to prescribe the conduct of the

Petitioner. 47 U.S.C. Sec. 205(a).

In *Bill Correctors, Ltd.* and *In re Certified Collateral Corp.*, the FCC has already reviewed eleven private complaints concerning the same allegations as the instant case, including its companion case of *Locks v. U.S. Telephone of the Midwest, Inc., decided sub nom. In re Certified Collateral Corp.*, FCC No. E-86-66.

Nader expressly noted that given the above statutory provisions, this Court has *required* deferral to the federal agency, citing *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932). *Nader*, 426 U.S. at 301. *United States Navigation Co.* rested upon this Court's interpretations of the Interstate Commerce Act which then was the act regulating interstate communications. The above provisions were transferred without substantive change from that Act to the Communications Act creating the FCC. 78 *Cong. Rec.* 10312-13 (Statement of Representative Rayburn, June 2, 1934). This Court noted in *Nader* that these provisions indicated Congressional intent to vest both restrictive and permissive authority in the federal agency with complete power over the private complaint. Even if the allegations may appear bad on their face, given the technical and commercial context of all attending circumstances the agency may approve or allow the practices with modification. However, the uniformity which is the purpose of the Act could not be obtained without resort to the Commission. *United States Navigation*, 284 U.S. at 482.

Although the District Courts have followed this distinction and found *United States Navigation Co.* controlling (*In re Long Distance Telecommunications Litigation: Certified Collateral Corp., et al. v. Allnet Communication Services, Inc., et al., supra*, 612 F. Supp. 892 (E.D. Mich. 1985)), the Illinois Appellate Court has failed to recognize it and threatens to undermine all of the District Courts' and FCC decisions unless this petition is granted.

THE INSTANT CASE IS THE FLIP-SIDE OF THE LOUISIANA PUBLIC SERVICE COMMISSION CASE IN THAT IT DEALS WITH THE STATES' INTERFERENCE WITH FCC DECISIONS IN INTERSTATE COMMUNICATIONS

In the recent decision of *Louisiana Public Service Commission v. the FCC*, 476 U.S. ___, 106 S.Ct. 1890 (1986) this Court recognized that there are numerous policy considerations in the restructuring of the telecommunications industry but held that the Communications Act nevertheless restricted the FCC from interfering in matters of intrastate communications. This case represents the opposite situation in that the policy considerations relevant in these matters concern the states' interference with the FCC decisions in interstate communications.

In light of this Court's decision in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), the Illinois court has certified *Kellerman, supra*, as a national class and will be entertaining nationwide policy determinations regarding interstate communications. Although it was the Congressional intent to vest this authority in the FCC, a single expert body which would determine, on a uniform national basis, the regulation of interstate communications, the effect of the Illinois courts' decisions in these proceedings has transferred that authority from the FCC to a trial court in the Circuit Court of Cook County, Illinois. Given the California state court proceedings in *Clothesrigger, Inc. v. GTE Corporation, supra*, it is readily forseeable that different nationwide standards will be set by different state courts for different interstate carriers or even for different sub-classes of customers of the same carriers. This would destroy the Congressional purpose of nationwide equality and uniformity in interstate communications established seventy-six years ago. It is crucially important for this Court to grant the instant petition for writ of *certiorari* to reaffirm the fundamental principles of federal regulation over interstate communications.

CONCLUSION

For all of the foregoing reasons, US Telecom, Inc., f/k/a U.S. Telephone, Inc. and U.S. Telephone of the Midwest, Inc., respectfully requests this Court to grant the petition for writ of *certiorari*.

Respectfully submitted:

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No. 87-286

Supreme Court, U.S.
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AUG 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

October Term, 1987

U.S. TELECOM, INC. f/k/a U.S. TELEPHONE, INC. AND U.S. TELEPHONE OF THE MIDWEST, INC.,

Petitioner,

v.

SPEAKERS OF SPORT, INC., on its own behalf and on behalf of all others similarly situated,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE FIRST DISTRICT OF THE STATE OF ILLINOIS

APPENDIX TO PETITION FOR CERTIORARI APPENDIX A THROUGH J

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APPENDIX A

149 Ill. App. 3d 898,
501 N.E. 2d 318
(1st Dist. 1986)
appeal denied,
114 Ill. 2d 558,
508 N.E. 2d 736 (1987)

SPEAKERS OF SPORT, INC.,
Plaintiff-Appellant,

vs.

U.S. TELEPHONE, INC., AND U.S. TELEPHONE OF THE MIDWEST, INC.,
Defendants-Appellees.

Appeal from the Circuit Court of Cook County

Honorable
David J. Shields,
Presiding.

No. 85-0292
Appellate Court of Illinois,
First District, Fifth Division.
Nov. 21, 1986.

JUSTICE LORENZ delivered the opinion of the court:

This is an appeal from an order of the circuit court of Cook County dismissing plaintiff's suit against U.S. Telephone (U.S.T.) and U.S. Telephone of the Midwest (U.S.T.M.). The dismissal was based on a finding of Federal preemption, primary jurisdiction in the FCC, and the pendency of a Federal action involving the same cause and the same parties.

We reverse and remand based upon the controlling authority of *Kellerman v. MCI Telecommunications Corp.* (1986), 112 Ill.2d 428, 493 N.E.2d 1045.

Plaintiff Speakers of Sport sought to bring this action on its own behalf and on behalf of the class of present and

former customers of U.S.T. and U.S.T.M. who had allegedly been improperly charged for certain uncompleted long distance telephone calls. Plaintiff alleged that defendants had a practice of billing for uncompleted telephone calls where the telephone rang six times or more. The fact of such charges was allegedly not disclosed in defendants' FCC filings, rate schedules, and advertising. One count of the first amended complaint charged defendants with fraud based on these omissions. A second count alleged breach of contract based on these omissions and based on plaintiff having contracted for service in reliance on the custom and practice that customers were only charged from the time a telephone connection was established. A third count charged that defendants' failure to disclose these charges violated the Illinois Consumer Fraud and Deceptive Business Practices Act (Ill. Rev. Stat. 1983, ch. 121 1/2, par 261, *et seq.*).

Defendants moved to dismiss the complaint on three grounds. They contended that exclusive jurisdiction over these claims was in the Federal Communications Commission and the Federal courts under the preemption doctrine. Alternatively they contended that under the doctrine of primary jurisdiction the complaint should be dismissed pending determination of the issues by the FCC. Finally they contended that the court should exercise its discretion to dismiss the action because of a pending Federal action involving the same parties and the same issues. The circuit court subsequently dismissed the complaint based on all three grounds.

We find that all the issues in this cause are controlled by our supreme court's decision in *Kellerman v. MCI Telecommunications Corp.* (1986), 112 Ill.2d 428, 493 N.E.2d 1045. In *Kellerman* the plaintiffs were subscribers of MCI 's long distance telephone service who alleged, *inter alia*, that in its advertisements and promotional materials MCI failed to disclose that it billed customers for

uncompleted calls and imposed a surcharge when the telephone rang six or more times before it was answered. It was alleged that defendant's conduct violated the Consumer Fraud and Deceptive Business Practices Act (Ill. Rev. Stat. 1983, ch. 121 1/2, par. 261, *et seq.*) and the Uniform Deceptive Trade Practices Act (Ill. Rev. Stat. 1983, ch. 121 1/2, par. 311, *et seq.*). Plaintiffs also alleged that this conduct constituted common law fraud and a breach of contract.

Defendant MCI moved to dismiss their actions, raising the same preemption argument raised by plaintiff Speaker of Sports in this cause. MCI also sought a stay of the actions based on the same contentions of primary jurisdiction and the pendency of a Federal action raised by plaintiff here. The circuit court's refusal to dismiss or stay these actions was then affirmed by this court and by the Illinois Supreme Court.

As the supreme court noted in *Kellerman*, the preemption doctrine provides that in some instances Federal law will override or preempt state laws concerning the same subject. (112 Ill.2d 428, 438, 493 N.E.2d 1045, 1049; *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 91 L.Ed. 1447, 67 S.Ct. 1146.) In determining whether Congress intended Federal law to preempt state law the courts must determine whether the Federal regulation is so persuasive that it may reasonably be inferred that the state could not supplement the regulation or whether state law actually conflicts with the Federal law. *Fidelity Federal Savings & Loan Association v. De La Cuesta* (1982), 458 U.S. 141, 153, 73 L.Ed.2d 664, 675, 102 S.Ct. 3014, 3022; cited in *Kellerman v. MCI Telecommunications Corp.* (1986), 112 Ill.2d 428, 439, 493 N.E.2d 1045, 1049.) The *Kellerman* court examined the Communications Act (47 U.S.C. sec. 151, *et seq.* (1982)), and determined that the plaintiffs' actions were not preempted by the Act, stating:

"The subject matter of plaintiffs' complaints

> involves neither the quality of defendant's service nor the reasonableness and lawfulness of its rates. Plaintiffs only allege that defendant disseminated fraudulent and deceptive advertisements concerning the cost of its long-distance telephone service. As such, plaintiffs seek to hold defendant to the same standards as they would any other business which advertises on a nationwide basis and which, in the course of its business, is subject to regulation from a number of Federal and State agencies. Moreover, these actions do not present 'an obstacle to the accomplishment' of the Federal policy of promoting a 'rapid, efficient * * * communication service with adequate facilities at reasonable charges.' (47 U.S.C.sec. 151 (1982).) The prosecution of these claims will in no way interfere with the delivery of long-distance telephone service to defendant's customers, and any possible effect the litigation could have on defendant's telephone rates is speculative at best. Finally, no Federal statute or regulation has been brought to our attention which would expressly prohibit these actions. Therefore, we find that Congress did not intend to occupy the field of interstate telephone service to the extent of barring these State-law claims for fraud, breach of contract and deceptive practices, and hold that plaintiffs' actions are not preempted." 112 Ill.2d 428, 443-44, 493 N.E.2d 1045, 1051-52.

In this cause defendants note that plaintiff's amended complaint contains many references to alleged "improper charges" by defendants. But when read in its entirety it becomes clear that the gravamen of the complaint concerns defendants' allegedly misleading advertising and rate schedules. Like the plaintiffs in *Kellerman*, the plaintiff here is not actually challenging the reasonableness or lawfulness of defendants' rates. Therefore under the authority of *Kellerman* we find no Federal preemption of plaintiff's state action.

The circuit court also dismissed plaintiff's complaint in this cause because it found that primary jurisdiction

over the dispute rested with the Federal Communications Commission. Yet this same contention was rejected by the *Kellerman* court. Under the doctrine of primary jurisdiction when an administrative agency has specialized expertise that would help resolve a controversy before the court, that court should stay the judicial proceedings pending referral of the controversy to that agency. *Nader v. Allegheny Airlines, Inc.* (1976), 426 U.S. 290, 48 L.Ed.2d 643, 96 S.Ct. 1978; *United States v. Western Pacific R.R. Co.* (1956), 352 U.S. 59, 1 L.Ed. 2d 126, 77 S.Ct. 161; *Kellerman v. MCI Telecommunications Corp.* (1986), 112 Ill.2d 428, 493 N.E.2d 1045.

In rejecting the applicability of this doctrine in *Kellerman* the Supreme Court stated:

> "* * * the plaintiffs here do not contest the reasonableness or lawfulness of defendant's charges or billing practices, but only seek recovery for defendant's failure to disclose certain facts. In resolving the dispute it will not be necessary to evaluate 'the economics or technology of the regulated industry' (*Nader v. Allegheny Airlines, Inc.* (1976), 426 U.S. 290, 305, 96 S.Ct. 1978, 1987, 48 L.Ed.2d 643); and, thus, we see little benefit, if any, in referring plaintiffs' claims to the FCC. Plaintiffs allege common law claims and violations of State statutes. The legal and factual issues that are involved in these cases are standard fare for judges, and, consequently, must be deemed to be 'within the conventional competence of the courts.' (*Nader v. Allegheny Airlines, Inc.* (1986), 426 U.S. 290, 305-06, 96 S.Ct. 1978, 1987, 48 L.Ed. 2d 643, 656.) Therefore, we reject defendant's argument that the primary-jurisdiction doctrine requires that these actions be stayed pending referral to the FCC." (112 Ill.2d 428, 446, 493 N.E.2d 1045, 1053.)

This holding is fully applicable to this cause where the plaintiff's similar claims raise no issue requiring the specialized or technical expertise of the FCC. Therefore we find that the circuit court erred in dismissing plaintiff's

suit on this ground.

The final basis for the circuit court's dismissal of this action was the pendency of a class action suit involving the same parties in the United States District Court for the Eastern District of Michigan. Under section 2-619(a) (3) of the Code of Civil Procedure (Ill.Rev. Stat. 1983, ch. 110, par. 2-619(a) (3)) a court may in the exercise of its discretion dismiss or stay an action when another action is pending between the same parties for the same cause.

Again, this same class action was cited by the defendant in *Kellerman* as a basis for staying the *Kellerman* suit. In affirming the circuit court's denial of the stay the *Kellerman* court specifically stated:

> "None of the counts remaining in the Federal action allege common law claims for fraud or breach of contract, or claims based on Illinois' deceptive trade and consumer fraud statutes, but relate only to whether defendant's failure to disclose its charges constitutes a violation of section 201(b) (47 U.S.C. sec. 201(b)) of the Communications Act. The issue of whether defendant's failure to disclose certain charges is 'unjust or unreasonable' under section 201(b) of the Communications Act has no relevance as to whether defendant's failure to disclose those charges constituted fraud, a breach of contract, or a violation of Illinois' statutes. While some of the same documentary evidence may be used in both cases, the lawsuits involve entirely different theories and litigation strategies. Thus, considerations of comity, multiplicity, and *res judicata* do not persuade us that these actions should be stayed. Moreover, as the trial judge observed, these actions were among the first to be filed in the country, and, consequently, it cannot be argued that the actions were filed with a vexatious purpose or with the intent to harass defendant. Thus, we find that the refusal to grant a stay pursuant to section 2-619(a) (3) was not an abuse of discretion." 112 Ill.2d 428, 448-49, 493 N.E.2d 1045, 1054.

This same reasoning is applicable to the cause before us. Defendants correctly note that the decision to grant or deny section 2-619(a) (3) relief is discretionary. (*People ex rel. Department of Public Aid v. Santos* (1982), 92 Ill. 2d 120, 440 N.E.2d 876.) But the purpose of this section is to avoid duplicative litigation. (*People ex rel. Phillips Petroleum Co. v. Gitchoff* (1976), 65 Ill.2d 249, 357 N.E.2d 534.) Our Supreme Court in *Kellerman* determined that the issues in the pending Federal action have no relevance to the issues of fraud, breach of contract, and violation of Illinois statutes raised in *Kellerman*. Those same issues are raised in this action. Therefore because no duplicative litigation would be avoided by the dismissal or stay of this action, we find that the circuit court abused its discretion in dismissing this action on that ground.

The judgment of the circuit court is reversed and this cause is remanded for further proceedings.

REVERSED AND REMANDED.

PINCHAM AND MURRAY, JJ., concur.

APPENDIX B

STATE OF ILLINOIS

SUPREME COURT CLERK

SUPREME COURT BUILDING

SPRINGFIELD 62706

May 19, 1987

Mr. Michael W. Ward
O'Keefe, Ashenden, Lyons, & Ward
One First National Plaza, S#5100
Chicago, IL 60603

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 64625 – Speakers of Sport, Inc., respondent, v.
U.S. Telephone, Inc., et al., petitioners.

Motion by petitioners for leave to file a motion for reconsideration of the order denying petition for leave to appeal. Motion *denied.*

Motion by petitioners to stay mandate pending disposition of motion for reconsideration of the order denying petition for leave to appeal or should said motion be denied to further stay mandate pending the timely filing and disposition of a petition for writ of certiorari in the United States Supreme Court. Alternative relief *allowed.*

JH:as
Enclosure

cc: Hannafan & Handler
Davis, Miner, Barnhill & Galland

B – 2

No. 64625

IN THE
SUPREME COURT OF ILLINOIS

Speakers of Sport, Inc.,
Respondent

v.

U.S. Telephone, Inc., et al.,
Petitioners

Appeal From
Appellate Court
First District

AC1-85-0292

ORDER

This matter has come for consideration upon the motion of *petitioner* to stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

FILED
May 19, 1987
SUPREME COURT CLERK

APPENDIX C

64625

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

April 15, 1987

O'Keefe, Ashenden, Lyons & Ward
Attorneys at Law
One First National Plaza, S#5100
Chicago, IL 60603

No. 64625 – Speakers of Sport, Inc., respondent, v. U.S. Telephone, Inc., et al., petitioners. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on May 7, 1987.

APPENDIX D

ORDER

ENTERED
CLERK OF THE CIRCUIT COURT
MORGAN M. FINLEY
DEC 28 1984
JUDGE DAVID J. SHIELDS
Deputy Clerk _____

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

SPEAKERS OF SPORT, INC, et al.
Plaintiffs,

v.

U.S. TELEPHONE, INC. and U.S. TELEPHONE OF THE MIDWEST, INC.
Defendants.

No. 84 L 3247

ORDER

This cause coming before the Court on Defendants' Motion to Dismiss pursuant to Il. Code Civ. Proced. §2-619, all parties being represent by counsel, memoranda and oral arguments having been submitted and the court being fully advised in the premises

IT IS HEREBY ORDERED

1) Defendants' motion to dismiss is granted due to Federal preemption;
2) Defendants' motion to dismiss is granted due to primary jurisdiction resting in the FCC; Plaintiff's request to stay the action is denied;
3) Defendants' motion to dismiss under §2-619 (a) (3) is granted.

Atty No.: 25832
Name: Michael W. Ward
Attorney for: U.S. Telephone, Inc. *et al.*
Address: 1 First National Plaza
City: Chicago
Telephone: 621-0400

84L142 742 , 19__

ENTER: /s/ _____
Judge Judge's No.

IN THE
CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT-LAW DIVISION

SPEAKERS OF SPORT,
Plaintiff,
vs.
U.S. TELEPHONE,
Defendant.

No. 84 L 3247

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable DAVID J. SHIELDS, Judge of said court, on Friday, the 28th day of December, 1984, at the hour of 10:00 o'clock A.M.

PRESENT:

MR. MICHAEL HANNAFAN and MR. SEAN O'SHEA, appeared on behalf of the Plaintiff.

MR. MICHAEL WARD,
appeared on behalf of the Defendant.

Christina F. Basis
Official Court Reporter
Law Division
Circuit Court of Cook County

THE COURT: Thank you for your respective remarks. I do not want to hear anymore about it.

I appreciate the cases that you have submitted, the arguments that you have made. I have also reviewed carefully an article in the Federal Communications Law Journal, 32 Fed Com LJ 205, entitled Storming the AT&T Fortress and the FCC Deregulated Common Carrier Services.

I read the cases of Benanti v. United States, 355 U.S. 96; the case of General Telephone of California and Federal Communications v. Federal Communications Division, 113 Federal 2d 390; New York Telephone Company v. FCC, 631 Federal 2d 1059; and certain other cases which were not cited in either brief.

I am satisfied that there is federal preemption. The motions to dismiss must be sustained. The FCC has general categorical control over the scheme and system with respect to telephone communication regulation; and that to proceed as you suggested in the state court would be inappropriate.

Pursuant to my discretion, the motion to dismiss pursuant to Section 619 will be sustained.

MR. WARD: Thank you, your Honor.

MR. HANNAFAN: We have raised in our brief that alternatively to a dismissal that it would be more appropriate to stay the proceedings.

THE COURT: I know you did.

MR. HANNAFAN: Until the FCC may or may not rule, if it ever gets around to it, and we think that in this case rather than a dismissal a stay is more appropriate so we can maintain the cause of action, should the FCC ever get around to deciding anything in the case.

THE COURT: I respectfully disagree with that. It will be dismissed. I am aware that you did suggest that, and it is in your brief.

MR. WARD: Do you want us to draft an order?

THE COURT: For your benefit you should. I think it is adequately said, but for your own protection . . .

MR. HANNAFAN: We would like an order, judge.

(Which was all the evidence heard and received in the above-entitled matter.)

APPENDIX E

2 F.C.C. Rcd. 2171 (1987)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of CERTIFIED COLLATERAL CORP.; Euromarket Designs, Inc. d/b/a CRATE AND BARREL; LILY M. FEITLER; MARK HOCHMAN; McINTOSH EMBOSSING, INC.; SEYMOUR LAZER; A. LINDA LEVENTHAL; ROGER LEE and LANI LEE; DAVID H. LOCKS; EARL E. OLIVE; CHARLES KAPLAN; and BELTING INDUSTRIES, CO., INC., on behalf of themselves and all others similarly situated,

Complainants,

v.

ALLNET COMMUNICATIONS SERVICES, INC., File No. E-86-063; GTE SPRINT COMMUNICATIONS CORP., File No. E-86-064; MCI TELECOMMUNICATIONS CORP., File No. E-86-065; U.S. TELEPHONE OF THE MIDWEST, INC., File No. E-86-066; THE WESTERN UNION TELEGRAPH COMPANY, File No. E-86-067; ITT-U.S. TRANSMISSION SYSTEMS, INC., File No. E-86-068,

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted April 6, 1987; Released: April 14, 1987

By the Chief, Common Carrier Bureau:

1. Before us is a complaint filed by the above-named complainants on behalf of themselves and all others similarly situated.[1] Complainants allege that each of them purchased telecommunications services from one or more

[1] Also before us are answers from each of the defendants and complainants' reply to the answers. In addition, The Western Union Telegraph Company ("Western Union") and ITT-United States Transmission Systems, Inc. ("USTS"), each filed a Motion for More Definite Statement. Complainants responded to those two motions. We dismiss the Motions for More Definite Statements as moot because we are dismissing the complaints.

of the defendant carriers[2] and each has been overcharged for some of those services. They seek refund of the overcharges and relief from the practices leading to the overcharges. For the reasons stated below, we will dismiss the complaint.

I. BACKGROUND

2. Most complainants were plaintiffs in class action suits[3] in the United States District Court for the Eastern District of Michigan. Therein it was alleged that defendants regularly charge consumers for long-distance telephone calls which are not actually completed and that their billing practices are such that the consumer is unlikely to discover such charges. The Court dismissed the complaints and referred them to this Commission under the doctrine of primary jurisdiction.[4] Therefore, complainants filed the instant complaint at the Commission on January 8, 1986, along with a motion for waiver of the Commission's procedural rules governing formal complaints. 47 C.F.R. § 1.735(b). The complainants believe these rules are not compatible with class action litigation. The Bureau granted the motion in part, finding that the named com-

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[2] GTE Corporation was also listed as a defendant in the original complaint. However, it filed a Motion to Dismiss Formal Complaint as to it, and the complainants have consented. Accordingly, we will grant GTE Corporation's motion.

[3] Belting Industries Co. Inc. asserts it is the representative of a subclass not pleaded in the District Court action.

[4] *Long Distance Telecommunication Litigation,* MDL No. 598, Case No. 84CU5639DT (E.D. Mich., June 27, 1985). *Lee v. Western Union* was still pending in the District Court when the instant complaint was filed at the Commission, but has since been dismissed. *Long Distance Telecommunication Litigation,* MDL No. 598, CA No. 85 73365 (E.D. Mich., June 2, 1986).

plainants appeared to have standing and that the complaints appeared to substantially comply with the formal complaint filing requirements. Therefore, it accepted the complaints. *Certified Collateral Corp. v. Allnet Communication Services Inc.*, Mimeo No. 3217 (released March 19, 1986) (*Order*). However, it deferred ruling on the issue of whether these complaints can be maintained as a class action suit.

3. With the exception of Belting Industries Co., Inc., the named complainants represent one or more of the subclasses of all persons who purchased long distance telephone service from each of the defendants.[5] Complainants allege that the defendants, long distance telecommunications providers, have charged class members for, *inter alia*, unanswered calls, ring time, holding time, busy signals, and central office recordings and have failed to disclose in their respective tariffs or elsewhere that they charge for this time. These actions, complainants maintain, violate Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), as unjust and unreasonable practices, and entitle the class to damages, including punitive damages of three times the actual damages, and the costs of prosecuting the suit. Moreover, they ask that defendants be permanently enjoined from imposing any charges like those of which they have complained here. They argue that in *Bill Correctors, Ltd. v. United States Transmission Systems, Inc.*, Mimeo No. 703 (released November 8, 1984) *(Bill Correctors)*, the Commission recognized that billing errors for unanswered calls, holding time, and busy signals were properly refundable charges. They ask that each defendant be required to account to the complainants and

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[5] Belting Industries Co., Inc. purports to represent the subclass of all persons who unsuccessfully made a request for refund of, or contested the imposition of, overcharges collected or levied by the carriers.

the class members for all charges imposed by defendants for unanswered calls, busy signals, and ring time. Furthermore, they allege that Belting's repeated requests for refunds were rebuffed at least partly because of carriers' requirements for "unduly onerous evidence" that the calls billed were not completed and that the policies of the carriers regarding refunds for improperly billed calls are unreasonable. First Amended Complaint at 13.

4. The defendants deny they are engaging in unlawful or unreasonable billing practices or imposing onerous requirements in their refund procedures.[6] They acknowledge that a charge may appear on a customer's bill for an unanswered call or for the lapse time between placement of the call and an answer. This occurs because some of the carriers' current interconnection arrangements with local exchange carriers lack the capability known as "answer supervision," which enables a carrier to ascertain the precise time between call placement and connection as well as to distinguish between completed and uncompleted calls. With the advent of equal access required by the Modified Final Judgment,[7] which will make "answer supervision" available equally to all long distance carriers, billing inaccuracies will diminish in the future. In the meantime, each of the carriers has developed alternate means to detect the initiation and length of calls and has made assumptions as to the length of time within which calls will generally be answered. Each has a procedure to provide refunds when notified by a customer of the overcharge. The defendants deny that these procedures are onerous. Moreover, they

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[6] Each of the six defendants filed a separate answer. While not all defendants advanced each argument, the following summary represents the common assertions in their answers.

[7] *United States v. AT&T*, D552 F. Supp. 131 (D.D.D. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

point out that none of the named complainants[8] asserted that it attempted to obtain a refund for the overcharges complained of here and was refused or was required to follow onerous procedures. Finally, according to the defendants, the Commission has already determined in *Bill Correctors* that the carriers' practices complained of here are reasonable and do not violate Section 201(b) of the Act.[9]

5. In their reply, complainants maintain that none of the defendants seriously dispute that its billing practices may result in overcharges – they merely contend that they have instituted internal systems for providing refunds to make the customers whole in the event such overcharges occur. Complainants do not concede that the surrogates

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[8] Belting is an exception. An informal complaint filed by Belting did not identify the carrier alleged to have denied a credit. When the Commission ascertained that the carrier was MCI Telecommunications Corp. ("MCI"), it forwarded a copy of the complaint to that carrier for its response. MCI states that as soon as it received the informal complaint, it notified Belting that it would investigate, that it filed a satisfactory response with the Commission within 30 days, that it issued Belting a credit, and that the Commission has disposed of the complaint. *See Letter* from Common Carrier Bureau to Belting Industries Co., IC No. 85-990 (Mar. 11, 1986). However, it points out that the Belting complaint involved an alleged "redundant" long distance service and "hidden" local message unit charges, but did not relate to alleged overcharges for unanswered calls, ring time, busy signals, holding time, or central office recordings at issue in this proceeding.

[9] MCI notes that this is one of a series of cases involving the same issues filed in state and federal courts as well as with the Commission. Therefore, MCI requests that the Commission resolve the issues raised by this complaint in a broad, industry-wide context. Furthermore, it asks for us to hold that challenges to MCI's charges and practices, including disclosure, are within the exclusive jurisdiction of the Commission.

for answer supervision adopted by the defendants are the most reasonable alternatives available. They maintain that they have insufficient information regarding the technical aspects of telephone networking on which to base an intelligent assessment of the billing conventions applied by the carriers. They demand discovery so they can test whether the overcharges could be minimized by reasonably available alternatives. Furthermore, according to the complainants, even if the carriers have selected the best possible method to avoid overcharges, the carriers' refund procedures should not be a substitute for refunds and damages at the Commission or in the courts unless those refund procedures are the best reasonably available.

II. DISCUSSION

6. We find that complainants have not met their burden of establishing a prima facie case. They have not alleged with specificity a single call for which a named complainant was both overbilled and refused a refund or was required to follow onerous procedures to obtain the refund. Belting Industries is the only named member of the class who alleged it unsuccessfully requested a refund for overcharges. Yet the informal complaint filed with the Commission by Belting Industries, which supposedly evidences the defendants' unreasonable and onerous refund practices for overcharges, is totally unrelated to charges for unanswered calls, ring time, holding time, busy signals, or central office recordings. In short, it is unrelated to the practices alleged in these complaints before the Commission and therefore provides no evidence on the issue of refund practices for billing errors.[10]

7. In *Bill Correctors* we considered the complaints on their merits, despite the lack of specificity as to the communications complained of and other procedural deficiencies, because they raised a generic question concerning

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[10] *See* Complaint, Exhibit B, and note 8, *supra*.

the carriers' billing practices which went beyond the precise issue of refunds. However, there is no reason to do so in the instant case because the carriers' billing practices no longer remain an open question. In *Bill Correctors* we determined that the billing practices complained of are not unreasonable as long as the carriers notify their customers of the possibility of erroneous charges and of their refund practices.[11] As discussed in more detail in paragraph 12, *infra*, the carriers advised the Commission that they do notify their customers of their billing and refund practices. We expect them to fulfill their contractual obligations and to refund overcharges. Complainants have not met their threshold burden of placing at issue any alleged failure by defendants to do so. As previously stated, the factual dispute over refunds, supposedly pleaded in the complaint, concerns completely different refund issues. The bare allegation that defendants' "intimation . . . that all refunds requested will be granted is . . . unbelievable" (Reply to Answers, at 4) is certainly insufficient. Nor have complainants submitted any evidence to suggest that the Bureau erred in its decision in *Bill Correctors*, that the situation has changed since then, that the magnitude of overcharges is more extensive than that recognized by the Bureau and should therefore be reassessed, or any other facts that would mandate that the Bureau reexamine the entire issue regardless of any specific evidence of wrongdoing.

8. Complainants apparently expected to gather the facts necessary to make their case through the discovery

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[11] The billing practices of the defendants in the instant proceedings are the same as, or similar to, the billing practices of the defendants in *Bill Correctors*. *See* para. 13, *infra*.

process.[12] As stated above, in our procedural *Order* we deferred ruling on the issue of whether the complaints could be maintained as a class action suit until we assessed the validity of the allegations. We noted that the Commission has no provisions regarding the certification of classes or procedures for maintaining class action suits. An examination of the allegations, however, reveals that complainants have not sufficiently pleaded their case to warrant ordering discovery.

9. Discovery, for example, would not uncover specific overcharges of the named complainants, let alone of the rest of the class members. All defendants have procedures to eliminate charges for calls which they suspect may be improperly billed because of the lack of answer supervision. Therefore, the only way they can identify any additional charges which should be removed is to rely on customer identification of the overcharges. Complainants' argument that the Commission should not impose "the requirement that all [uncompleted] calls of any complaining customer be identified with specificity at the outset" as a precondition to the prosecution of a complaint (Reply to Motions for More Definite Statement, at 5-6) is inapposite since they have not identified *any* such calls even applying to them. While the named complainants might not be able to identify all instances of overcharges, that does not relieve them of their obligation to specify at the outset at least the ones that are within their unique knowledge. Without some evidence of unlawful behavior on the part of the carriers, there is no reason to permit complainants to go on a fishing expedition on the issue of billing practices in general.

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[12] *See,* for example, their Reply to Motions for More Definite Statement, in which they argue that the motions should be denied because the information necessary for more specific pleading of fact can come only from defendants.

10. Nor is discovery necessary to uncover alleged onerous refund practices. If indeed any named complainants have been overcharged and have been required to fulfill onerous conditions to obtain a refund, they can detail the exact steps that were required. If they have not attempted to obtain a refund, then their conclusion that the required steps are onerous is mere speculation. On the other hand, the reasonableness of the internal decisionmaking process of the carriers is not susceptible to being adjudicated in the abstract. Whether to make a specific refund must be determined on a case by case basis. The Commission's rules provide procedures whereby we can, and do, resolve disputes when a party alleges that a refund was unreasonably denied. 47 C.F.R. § 1.711, *et seq.*

11. Since the complainants have not alleged any specific instances of wrongdoing, their case rests on the allegation that defendants' failure to disclose their billing practices regarding unanswered calls, ring time, holding time, busy signals, and central office recordings violate Section 201(b) of the Communications Act. They cite part of that Section to buttress their argument:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is . . . declared to be unlawful.

12. Accordingly, if defendants' charges or practices are unjust or unreasonable, they are unlawful. However, in *Bill Correctors* the Bureau examined the very billing and charging practices which the complainants allege are unlawful and determined that they are not unreasonable. Moreover, it specifically found that these billing practices

need not be disclosed in the carrier's tariffs.[13] The Bureau required the carriers to advise the Commission of their notification method within 30 days of the release of the order. The Bureau specified that "[u]nless our review of these submissions reveals that the notification procedures are unsatisfactory, we do not anticipate the need for further responsive pleadings." *Bill Correctors*, at para. 9. The defendants in *Bill Correctors* filed submissions, as directed, and the Bureau took no futher (sic) action. The complainants have raised nothing new which would cause us to take action against defendants at this point in time.

13. Four of the six defendants in the instant action were defendants in *Bill Correctors*.[14] The other two, U.S. Telecom[15] and Western Union, included with their answers evidence of notification procedures similar to those submitted by the other carriers in *Bill Correctors*. Complainants have proferred no evidence that would require us to reexamine the general problem of billing errors due to lack of answer supervision nor to examine the specific practices of a particular carrier. Complainants must provide more than the mere assertion that neither the record in *Bill Correctors* nor the answers in the instant complaints contain adequate detail to make an intelligent assessment of the billing conventions applied by the carriers.

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[13] The complaints in *Bill Correctors* alleged a violation of Section 203 of the Communications Act, 47 U.S.C. § 203, which provides for the filing of schedules of charges. We note that since the defendants are nondominant carriers, they are no longer required to file tariffs at the Commission. To the extent that they choose to file tariffs, of course, they must conform to the terms of those tariffs.

[14] Allnet Communications Services, Inc., GTE Sprint Communications Corp., MCI, and ITT-USTS (USTS was the defendant in *Bill Correctors*).

[15] US Telecom-Communications Services Company, f/k/a U.S. Telephone of the Midwest, Inc.

14. For the reasons discussed above, we find that the complainants have not set forth a case with sufficient specificity to grant the relief sought, and the complaints will be dismissed. For these same reasons we conclude that the complaint filed as a class action suit herein lacks the required specificity as to the nature of the purported violations. Our Rules do not contemplate class action complaints, and we do not propose to accept such complaints for filing. Once a complainant identifies a wrongful act, the Rules provide both adequate procedures to remedy a specific violation of the Rules or the Communications Act and sufficient flexibility to enable the Commission to address generic questions, as indeed the Bureau did in *Bill Correctors*.

15. Although we are dismissing the instant complaints, we deny MCI's request for a holding that its charges and billing practices are exclusively governed by the Communications Act and are within the exclusive jurisdiction of the Commission. We decline to grant MCI's request since it is unnecessary to the disposition of the instant complaints.

III. ORDERING CLAUSES

16. Therefore, IT IS ORDERED that the above-captioned complaints ARE DISMISSED.

17. IT IS FURTHER ORDERED that the Motion to Dismiss Formal Complaint against GTE Corporation IS GRANTED.

18. IT IS FURTHER ORDERED that the Motions for More Definite Statement filed by Western Union and USTS ARE DISMISSED as moot.

19. IT IS FURTHER ORDERED that MCI's request for a ruling on jurisdictional exclusivity IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

APPENDIX F

612 F. Supp. 892 (E.D. Mich. 1985),
appeal pending No. 85-1684
(6th. Cir. 1986)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re: LONG DISTANCE TELECOMMUNICATION LITIGATION

MDL No. 598

CERTIFIED COLLATERAL CORPORATION, et al., on behalf of themselves and all of those similarly situated,

Plaintiffs,

v.

ALLNET COMMUNICATIONS SERVICES, INC., et al.,

Defendants.

CHARLES KAPLAN,

Plaintiff,

v.

ITT-UNITED STATES TRANSMISSION SYSTEMS, INC.,

Defendant.

Case No. 84CV5639DT
HONORABLE
ANNA DIGGS TAYLOR

MEMORANDUM OPINION AND ORDER

These matters come before the court on two independent motions to dismiss by the parties defendant which, because of their close relationship in questions presented, must be determined together. The first matter discussed herein is the consolidated motion of the defendants in *Certified Collateral Corporation* to dismiss the consolidated

complaint of the plaintiffs. That complaint has replaced the complaints filed in ten separate class actions which had been filed in ten other U.S. District Courts and which the Judicial Panel on Multidistrict Litigation had transferred to this court in 1984.[1] The consolidated complaint essentially charges defendants, all common carriers in competition with American Telephone and Telegraph Company (AT&T) for the provision of long distance phone services to consumers thereof, with improperly charging the consumer plaintiffs for long distance calls which were never completed, and with failing to advise the plaintiffs of such a practice. Defendants are alleged to have violated both federal statutes and federal common law, and this court's jurisdication is invoked under 28 U.S.C. §1332 (1966) and 47 U.S.C. §207 (1962), the jurisdictional provision of the Federal Communications Act of 1934, 47 U.S.C. §151 *et seq* (1962), the statute which is central to this entire set of disputes. For the reasons which follow, defendants' consolidated motion to dismiss must be granted, and this case referred to the Federal Communications Commission (FCC) for disposition.

Although the *Kaplan* action was also transferred to

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[1] *Lee v. MCI Telecommunications Corp.*, No. C-84-1471 JPV (N.D. Cal.): *Euromarket Design, Inc. v. MCI Telecommunications Corp.*, No. 84-880 (D. Mass.); *Euromarket Design, Inc. v. Allnet Communications Services, Inc.*, No. 84-881 (D. Mass.); *McIntosh Embossing, Inc. v. MCI Telecommunications Corp.*, No. 4-84-Civ-271 (D. Minn.); *Hochman v. GTE Corp., et al.*, No. 83-4555 (D.N.J.); *Certified Collateral Corp. v. MCI Telecommunications Corp.*, No. 84-C-0388 (N.D. Ill.); *Olive v. Allnet Communication Services, Inc.*, No. 84-C-1112 (N.D. Ill.): *Locks v. U.S. Telephone of the Midwest, Inc.*, No. 84-C-1465 (N.D. Ill.); *Feitler v. GTE Sprint Communications Corp.*, No. CV-84-0759 (M.D. Penn.); *Lazar v. MCI Communications, et al.*, No. 1435-B(M) (S.D. Cal.); *Leventhal v. GTE*, No. 84-CV-602.

this court by the Multidistrict Panel as a "tag-along" action, presenting claims similar to those of the plaintiffs above, *Kaplan* has not joined in the consolidated complaint, and defendant therein seeks reconsideration by this court of a previous partial denial of its motion to dismiss plaintiff Kaplan's complaint prior to its transfer to this district. Although that motion was originally denied by the United States District Court for the Eastern District of New York, *Charles Kaplan v. ITT-U.S. Transmissions Systems*, 589 F. Supp. 729 (EDNY 1984) this court will, for the reasons set down below, both entertain and grant defendant's motion, and the *Kaplan* action is also dismissed and referred to the FCC.

I. CERTIFIED COLLATERAL CORPORATION, et al. v. ALLNET COMMUNICATIONS SERVICES, INC., et al.

THE CONSOLIDATED COMPLAINT

Plaintiffs' joint complaint alleges that defendants, as providers of long distance telephone services (also referred to as common carriers), requlary charge consumers for long-distance telephone calls which are not actually completed and further, that each and every defendant's billing practices and procedures are such as to render unlikely the discovery of such charges by the consumer. Plaintiffs claim that it is the practice of defendants to routinely fail to inform their customers of these alleged charging procedures.

Count I of the complaint is brought under §201(b) of the Communications Act, 47 U.S.C. §201(b) (1962), and contends that defendants' above-described charges and practices are unjust and unreasonable. Count II claims that this alleged misconduct is also violative of federal common law principles of fraud. Count III cites the same conduct under §207 of the Communications Act. Count IV claims breach of contract by defendants, and Count V asserts a conversion claim. These two counts (IV and V)

are also brought under federal common law, plaintiffs contend. Finally, plaintiffs assert that defendants' conduct herein constitutes a violation of the Racketeer Influences and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq.* (Supp. 1984) (Count VI).

COUNT I - § 201(b) COMMUNICATIONS ACT CLAIM

4084 Initially, this Court must note that it has previously decided the first of these cases, *Control Electronics, Inc. v. Southern Pacific Communications Co.*, No. 83-1010 (E.D. Mich 1984), *appeal dismissed*, No. 84-1439 (6th Cir. October 30, 1984), which presented facts and allegations quite similar to those contained in this consolidated complaint. After a study of the doctrine of primary jurisdiction, this court held that, under that doctrine, it must defer to the Federal Communications Commission, and dismiss the case. A review of the primary jurisdiction doctrine is in order here, but first, we should examine the statutory provision upon which plaintiffs rely. 47 U.S.C. § 201(b) (1962) provides in pertinent part:

> (b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.

PRIMARY JURISDICTION

The Supreme Court described the purpose and character of the primary jurisdiction doctrine in *U.S. v. Western Pacific RR Co.*, 352 U.S. 59 (1956):

> The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. Exhaustion applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the

> administrative process has run its course. Primary jurisdiction, on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. 352 U.S. at 63-64.

The concept of administrative primary jurisdiction had its genesis at least as early as *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1906), in which the plaintiff brought suit against the railroad in a state court to recover allegedly unreasonable charges made by the railroad. The Interstate Commerce Act expressly provided that an aggrieved party could sue for damages either before the Interstate Commerce Commission (ICC) or in United States District Court, and expressly provided that common law remedies (such as suit in state court) were preserved. Nevertheless, the court ruled that a plaintiff must first attack the reasonableness of charges made by the railroad before the ICC. The primary reasons advanced by the court for this construction was the necessity of uniformity in determining what rates were reasonable or unreasonable under the Act.

This doctrine was further explicated and expanded in *Far East Conference v. United States*, 342 U.S. 570 (1952). There the United States brought its antitrust action against an association of steamship companies which had promulgated a dual system of rates favoring shippers who agreed to utilize conference members exclusively. The court held that the Federal Maritime Board had primary jurisdiction over rates charges by those companies. Although antitrust claims made by the government did not invoke the provisions under which the Maritime Board operated, the court held that the applicability of antitrust

laws to the rate system being challenged must necessarily be judged, in the first instance, by the federal agency charged by Congress with the responsiblility of regulating the particular industry in question. Quoting *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, 485, the court said:

> Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect to the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal. 343 U.S. at 573-74.

The doctrine of primary jurisdiction is therefore applied to promote a number of goals which collectively recognize the primacy of regulatory statutes and agencies enacted and created by Congress. Among these goals are (1) uniformity in regulation of the business or activity involved; (2) utilization of the specialized knowledge and experience of the designated administrative body; and (3) exercise of administrative discretion in effecting regulatory policy entrusted to an agency.

As the Sixth Circuit states in *Detroit, Toledo and Ironton RR Co. and Grand Trunk Western RR Co. v. Consolidated Rail Corp.*, 727 F.2d 1391 (1984):

> The rule which emerges from an examination of representative decisions is that federal courts should decide issues related to purely commercial transactions between regulated carriers and should perform their judicial function of interpreting and enforcing contracts between such parties except when such judicial action results in interference with the functions which Congress has placed in the hands of the Commission (here the

court was referring to the Interstate Commerce Commission). *Id* at 1396.

The courts have customarily considered four factors in determining whether to defer initially to administrative review of a matter under the doctrine of primary jurisdiction. These are:

1. Whether the question at issue is within the conventional experience of judges;

2. Whether the question at issue lies peculiarly within the agency's discretion or requires the exercise of agency expertise;

3. Whether there exists a danger of inconsistent rulings disruptive of a statutory scheme; and

4. Whether a prior application to the agency has been made. *Oasis Petroleum Corp. v. U.S. Dept. of Energy*, 718 F. 2d 1558, 1564 (Temp. Emer. Ct. App. 1983).

The FCC has been responsible for the regulation of the communications industry for a considerable period of time. Defendants herein have been involved in a long struggle with AT&T over their right to access to AT&T facilities in order to provide the long-distance services which are challenged here. The FCC has been deeply involved in hearing and resolving these disputes. The very existence of defendants as competitors of AT&T in the long distance telephone market derives from the FCC decision that such competition would be beneficial to the public interest. The very reasonableness of the practices here alleged is a facet of questions of access and the FCC's prior determination of what constitutes the public interest.

In disputes between defendants, other common carriers and AT&T over the rates and access charges of AT&T, other circuits have held that these matters fell within the primary jurisdiction of the FCC. *Booth v. AT&T*, 253 F. 2d 57 (7th Cir. 1958); *MCI Communications Corp. v. AT&T*, 496 F. 2d 214 (3rd Cir. 1974).

It would be impossible for the FCC to fulfill its function of regulating the long distance telephone market if numerous federal district courts also undertake to decide the substantial questions which directly or indirectly affect the position of the carriers within the market. *See Burlington Northern, Inc. v. United States,* 459 U.S. 131 (1983) There a D.C. Court of Appeals which rejected ICC rate orders was held without power to freeze those rates prior to a decision by the Commission as to what reasonable rates should be).

The Federal Communications Act charges the FCC with the duty of prescribing just and reasonable charges, practices, classifications and regulations regarding such services, in the event those adopted by a carrier are found to be unreasonable or otherwise in violation of the Act. 47 U.S.C. § 205(a), provides:

> (a) Whenever, after a full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum or minimum, (sic) charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Thus, the FCC has authority under the Communica-

tions Act to grant to plaintiffs all of the relief requested in this action, that is damages, 47 U.S.C. § 207, and injunctive relief, 47 U.S.C. § 207. Because the FCC may also determine the reasonableness of rates under the Act, its authority regarding this matter is both superior to that of this court and broader in scope.

Regarding the second factor mentioned in *Oasis, supra,* the question of the "reasonableness" of defendant carriers' rates and practices does appear to lie well within the FCC's area of expertise and jurisdiction. Given the numerous actions which were pending before other United States District Courts prior to their transfer here, and the fact that additional suits continue to be transferred to this forum presenting the identical circumstances and contentions; and the fact that the complaint essentially alleges overcharging of customers and a practice of failure to inform; and that the FCC has itself found that defendants' charging practices are "within this Commission's expertise," *Bill Correctors, Ltd. v. MCI,* ____ F.C.C. 2d ____ (11/8/84), this court is compelled to refer these cases to the FCC for determination of whether there has been a breach of the statutory duty to impose charges and implement practices which are just and reasonable. Moreover, the FCC, unlike this court, may order such other practices as it may then determine reasonable in the industrial context, in its wisdom.

The court notes further that the FCC is conducting ongoing studies and adjudications of the relationship between the common carriers (including defendants herein) and AT&T, and the impact of that relationship upon the ability of these carriers to obtain "answer supervision," such that they would be fully aware of call completions. *MTS and WATS Market Structures,* 48 Fed. Reg. 42, 984, 43, 001 (1983), *aff'd sub. nom., National Association of Regulatory Utility Commissioners v. FCC,* 737 F.2d 1095 (D.C. Cir. 1984). Those proceedings further support the

decision of this court to defer decisionmaking in these cases to the FCC, which has been responsible for resolution of the numerous controversies involving the common carrier defendants and AT&T for thirteen years. *Specialized Common Carrier Services*, 29 F.C.C. 2d 870 (1971), *aff'd sub. nom., Washington Utilities and Transportation Commission v. FCC*, 513 F. 2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

Consideration of the third and fourth factors set forth in the *Oasis* case emphasize the necessity for referral of these problems to the FCC. There is a genuine danger of inconsistent adjudications where, as here, numerous lawsuits have been brought by individuals and class action plaintiffs in different state and federal courts across the country. Only the FCC has been involved with the material issues in these cases since their very inception, and only it should attempt to review the purported practices of defendants regarding their reasonableness, nationally. Courts have not hesitated to defer to an expert agency when such deference will promote uniformity and consistency, and this court must do so in this instance. Even the conduct of these lawsuits on a multidistrict basis cannot fulfill the intention of Congress that the Commission make the determinations here required.

Because the FCC is already reviewing the practices and procedures here complained of in *Bill Correctors*, *supra*, these matters are being simultaneously adjudicated by this forum and that agency, and these parallel efforts must be discontinued.

The court further notes that, since its decision in *Control Electronics*, four other federal courts have been presented with § 201(b) challenges materially indistinguishable from the challenges raised here. Consistent with this court's decision in *Control Electronics*, each of these federal courts has dismissed the Communications Act claim under

the doctrine of primary jurisdiction.[2] In addition, two state courts have dismissed purported state law challenges to telecommunications carriers' charges and practices under the doctrine of primary jurisdiction.[3]

The "reasonableness" determination required under § 201(b) must be made in the first instance by the FCC, and not by this court or any other. As the expert agency regulating telecommunications carriers, the FCC is most familiar with the technical and policy issues governing defendants' provision of long distance telephone services, and it can, as we have seen, afford relief at the least equivalent to that sought by plaintiffs here. It is presently conducting related proceedings, and with full determinations on the merits of these case (sic), it may avoid the possibility of judicial dispositions inconsistent with overall industrial concerns and federal policy.

COUNT III - § 207 COMMUNICATIONS ACT CLAIM

47 U.S.C. § 207 provides, in pertinent part, as follows:

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[2] *Lee v. Western Union Telegraph Co.,* No. C 84-1472 TEH (N.D. Cal. 1984), *appeal dismissed,* No. 84-2383 (9th Cir. January 4, 1985) (Def. Exs. 11, 12); *Schuster v. GTS Sprint Communications Corp.*, No. 83-5374 (N.D. Cal. 1984), *appeal dismissed,* No. 84-2385 (9th Cir. January 9, 1985) (Def. Exs. 13, 14); *Retail Recruiters of New York, Inc. v. MCI Telecommuncations Corp.,* No. 83 Civ 8048 (S.D. N.Y. 1984), *appeal dismissed,* No. 84-7647 (2d Cir. October 31, 1984) (Def. Ex. 15, 16); *Kaplan v. ITT-U.S. Transmission Systems, Inc.,* 589 F. Supp. 729 (E.D. N.Y. 1984) (Def. Ex. 17).

[3] *Speakers of Sport v. U.S. Telephone, Inc. et al.,* No. 84 L 3247 (Cir.Ct. Cook Cty., Ill. 1984), *appeal pending,* No. 85-292 (Ill. App. Ct. 1985) (Def. Ex. 18, 19, 20); *Discount Den v. Allnet Communications Services, Inc.,* No. 84 CH 1059 (Cir. Ct. Cook Cty., Ill. 1984) (Def. Ex. 21, 22, 23). *But, see, Kellerman, et al. v. MCI Telecommunications Corp.,* No. 82 CH 11065 (Cir. Ct. Cook Cty., Ill. 1984), *appeal pending,* No. 84-2877 (Ill. App. Ct. 1984) (Def. Ex. 24).

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

This provision, rather than providing substantive rights, as plaintiffs claim, merely outlines the concurrent jurisdiction of the FCC and federal district courts to hear claims of plaintiffs that defendants have violated other provisions of the act. It does not set out elements which comprise a separate and independent cause of action. As plaintiffs have not otherwise pleaded a violation of some other actionable statutory provision in this court, it must be dismissed.

COUNT II, IV AND V - FEDERAL COMMON LAW CLAIMS

Under these counts plaintiffs urge the court to create federal common law claims of fraud, breach of contract and conversion, apparently because this court has previously held that identical state law challenges are preempted by the Federal Communications Act. *Lazar v. MCI Communications Corp. et al.*, MDL No. 598, 84 CV4801DT (E.D. Mich. 1984).

Under *Ivy Broadcasting Co. v. American Telephone and Telegraph Co.*, 391 F. 2d 486 (2d Cir. 1968), plaintiffs may state a claim under federal common law only "where neither the Communications Act itself nor the tariffs filed pursuant to the Act deals with a particular question." *Ivy*, 391 F.2d at 491. In *Ivy*, the court created federal common law because it found that the Communications Act did not regulate the conduct challenged. There, the plaintiff radio broadcasting company was found not to have a state law cause of action to redress AT&T's allegedly negligent operation of its lines and discriminatory billing prac-

tices. The absence of applicable state common law established the necessity of a federal common law. The Second Circuit Court of Appeals had previously determined that "questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications services are to be governed solely by federal law and that the states are precluded from acting in this area." 391 F.2d at 491.

In the instant case, unlike *Ivy*, both this court and the FCC have recognized and expressly observed that the Communications Act regulates the challenged conduct. The plaintiffs, by their very allegations under the Act, acknowledge its applicability. In *Lazar*, *supra*, this court held that the conduct complained of herein is not regulated by principles of common law, but falls exclusively under the Federal Communications Act. *Lazar* moved to remand his case to California state court on the grounds that he had not claimed under a federal statute. This court held, however, that plaintiff could not defeat proper removal by artful pleading, and upon examination of the substance of the allegations in plaintiff 's complaint, found that they were indeed grounded in federal communications law, in that they challenged the "reasonableness" of defendant telephone carriers' billing and disclosure procedures. Plaintiff 's motion was thus denied.

Similarly, plaintiffs here may not override the preemptive scheme of federal law outlined in the Federal Communications Act of 1934 by a claim of federal common law. The act, which sets forth a comprehensive body of legislation overseeing charges, practices, duties and liabilities of interstate telecommunications carriers in connection with such carriers' provision of interstate long distance service to its customers, would surely be nullified by such a proposition.

COUNT VI-RICO CLAIM

Although this court recognizes the current differences of opinion among the circuits regarding private causes of action brought under 18 U.S.C. §§1961 *et seq* (Supp. 1984), and the controversial treble damages provision contained therein, it has chosen to take Congress at its word, and has not superimposed "standing" or other unwritten requirements upon the private plaintiff. *Gerald Przybylski v. Freiborne Industries, Inc.*, No. 84CV2193DT (E.D. Mich. April, 1985).

In the instant matter, although defendants vigorously assert the very arguments which this court has rejected in *Przybylski*, the RICO claim of the plaintiffs must fail under present circumstances for other reasons. Because the central issue here is whether the defendants' conduct complained of is "reasonable" under federal communications law, and because the FCC must first make this determination before any "injury," "crime" or "liability" on the part of defendants can be established, it would be inappropriate for this court to attempt to adjudicate plaintiffs' RICO claim before such a determination has been made. There simply is no basis for such a claim.

CONCLUSION

For the foregoing reasons, the defendants' consolidated motion to dismiss plaintiffs' consolidated complaint is hereby granted, and the case referred to the Federal Communications Commission.

II. CHARLES KAPLAN V. ITT-UNITED STATES TRANSMISSION SYSTEMS, INC.

Defendant herein seeks reconsideration by this court of the partial denial of its motion to dismiss plaintiff's complaint, decided by Hon. I. Leo Glasser of the Southern District of New York. *Kaplan v. ITT-U.S. Transmission Systems, Inc.* 589 F. Supp. 729 (E.D.N.Y. 1984). As the transferee forum in this multidistrict case, this court clearly

has the authority and obligation to entertain motions for reconsideration, as it would in any other case. *In re Upjohn Company Antibiotic Clerocin Products Liability Litigation*, 664 F.2d 114 (6th Cir. 1981). For the reasons below, defendant's motion must be granted, and plaintiff's complaint dismissed on the same grounds discussed in *Certified Collateral*, above.

Plaintiff Charles Kaplan filed this action in the United States District Court for the Eastern District of New York on November 3, 1983. The first claim of the complaint alleged that defendant USTS's "practice of billing . . . for unanswered calls without providing (1) prior notice of those charges [and] (ii) notice of availability for those charges . . . " constituted an unjust and unreasonable charge and practice prohibited by Section 2011(b) of the Communications Act, 47 U.S.C. § 201(b). Complaint, ¶ 20. The complaint went on to allege that the same conduct challenged under the Communications Act also constituted state common law fraud and breach of an alleged contract between USTS and its customers.[4]

The claims asserted in the complaint in the *Kaplan* case are typical of the claims alleged in the other actions against USTS's competitors that were ultimately the subject of the transfer motion before the Judicial Panel on Multidistrict Litigation (JPML). In particular, Goodkind, Wechsler & Labaton, the law firm that represented plaintiff Kaplan against USTS, also brought two suits on behalf of other plaintiffs against MCI Telecommunications Corporation and GTE Sprint Communications Corporation. *Retail Recruiters of New York v. MCI Telecommunications Corp.*, 83 Civ. 4084 (S.D. N.Y.); *Schuster v. GTE Sprint Communications Corp.*, C83-5374 (N.D. Cal.). Aside

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[4] The complaint also alleged violations of the New York General Business Law that were dismissed by Judge Glasser on preemption grounds.

from differences in the identities of the parties and the state statutory claims asserted, the complaints in *Retail Recruiters* and *Schuster* were identical to the complaint in *Kaplan*.

Motions to dismiss, based principally on the doctrines of primary jurisdiction and preemption, were made in a number of the cases that had been filed in federal district courts across the country. In April 1984, an application was made to the JPML to transfer these pending actions to a single district for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407.

While the transfer motion was pending before the JPML, the district courts ruled on the various defendants' motions to dismiss. This court was the first to do so, holding on May 7, 1984, that an action against six of USTS's competitors and unidentified "Roe Corporations" should be dismissed. *Control Electronics, Inc. v. Southern Pacific Communications Company*, 83CV1010DT (E.D. Mich. 1984). On June 29, 1984, Chief Judge Motley of the Southern District of New York reached the same result and dismissed the *Retail Recruiters* case, which, as indicated above, was one of the three identical actions filed by plaintiff Kaplan's counsel.

When Judge Glasser entered his decision on July 23, 1984, he reached a result that conflicted, in part, with the decisions of the other courts that had already ruled. Judge Glasser agreed that plaintiff Kaplan's principal claim, brought under Section 201 of the Communications Act, should be dismissed and referred to the FCC on primary jurisdiction grounds. However, he denied USTS's motion to dismiss the complaint's purposed common law claims even though those claims were based on the same conduct that plaintiff challenged under the Communications Act. Judge Glasser held that, although plaintiff had originally pleaded state law, his common law claims in fact arose under federal, rather than state, common law; that these "federal"

common law claims created a federal cause of action separate and distinct from plaintiff's claim under the Communications Act; and that the federal common law claims which his decision created should not be sent to the FCC under the primary jurisdiction doctrine.

In August 3, 1984, Judge Henderson of the Northern District of California decided the motion to dismiss the *Schuster* case, the third of the three identical actions that had been commenced by plaintiff Kaplan's attorneys. Although Judge Henderson took note of Judge Glasser's decision, he chose to follow this court's decision in *Control Electronics* rather than Judge Glasser, and dismissed the complaint in its entirety on the grounds that the federal claims were within the FCC's primary jurisdiction and the state claims were preempted by federal law.

On August 16, 1984, Judge Glasser granted USTS's motion to certify his decision for immediate appeal to the Second Circuit, where plaintiff's appeal from Chief Judge Motley's dismissal of the *Retail Recruiters* case was already pending. In granting this motion, Judge Glasser found, *inter alia*, that his decision involved "questions of law as to which there are substantial grounds for differences of opinion. . . ." 28 U.S.C. § 1292(b).

On August 15, 1984, the JPML entered its order transferring the remaining pending cases to this court. In that order, the Panel deferred consideration of whether the *Kaplan* case should also be transferred until the Second Circuit had acted on USTS's application for leave to pursue its interlocutory appeal certified by Judge Glasser.

Plaintiff Kaplan originally did not oppose USTS's motion for permission to appeal in the Second Circuit. However, in mid-October 1984, plaintiff's counsel voluntarily dismissed the appeal that had been brought in the *Retail Recruiters* case, and submitted an affidavit urging the Second Circuit to deny USTS's motion in light of this development. The appellate court then denied USTS's

motion in an order entered October 31, 1984. On November 19, 1984, the JPML, without any further application by any party, entered an order transferring the *Kaplan* case to this court.

While the judicial proceedings described above were in progress, the FCC had been considering formal complaints filed by Bill Correctors, Ltd. which asserted claims under the Communications Act substantially identical to those that had been asserted in the courts. *Bill Correctors, Ltd. v. United States Transmission Systems, Inc.*, FCC File NO. E-84-6. On November 8, 1984, the FCC's Common Carrier Bureau released a decision and order denying these complaints. This decision clearly indicated that the FCC is prepared to exercise its regulatory authority not only over the carriers' billing practices as such, but also over the way in which those practices are disclosed to customers. More specifically, the FCC decision states that "Bill Correctors has thus properly raised an area of concern, the method by which the carriers should notify customers of the possibility of erroneous charges for short calls and of their refund policies therefore." The order directed each defendant carrier to file a description of the notification method used or to be used to advise customers of potential billing errors and refund policies within thirty days of its entry.

Thus, there have been significant changes in circumstances since the transferor court acted in this matter, indicating the necessity to reconsider the decision made by Judge Glasser. As another Court of Appeals has stated:

> The transferee judge's authority to coordinate consolidated pretrial proceedings in multidistrict cases is the essential contribution of the multidistrict transfer procedure. That judge has the power to set aside pretrial rulings of transferor courts, and courts performing auxiliary roles must be guided by the transferee judge's rulings.

In re Multi-Piece Rim Products Liability Litigation, 653 F.2d 671 (D.C. Cir. 1981).

Although ordinarily the transferee court will not lightly disturb the ruling of a transferor court, in observance of the doctrine of the "law of the case," the Sixth Circuit expressly rejected in the *Upjohn* case, *supra*, the position that this doctrine precluded the transferee court from reconsidering a tranferor court's order, holding that the "law of the case," if a proper concept in this context, would not in all events control. 664 F.2d at 120.

The court in *Upjohn* pointed out that the Sixth Circuit had "recognized that this doctrine [of law of the case] is not an inexorable command." *Id.* The court cited its earlier decision in *Petition of United States Steel Corp.*, 479 F.2d 489, 494 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973), in which the court had held that the doctrine is "directed to a court's good sense so as to relieve a court of rigid adherence to its former decision. . . ." Among the well recognized exceptions to the law of the case docrine are (a) a court may reexamine an earlier ruling in light of changes of fact or circumstances that have occurred since that decision was rendered, *see, e.g., In re Exterior Siding and Aluminum Coil Antitrust Litigation*, 696 F.2d 613, 617 (8th Cir. 1982), *vacated en banc on other grounds by an equally divided court*, 705 F.2d 980 (8th Cir.), *cert. denied*, 104 S.Ct. 204 (1983), and (b) a court may, notwithstanding the law of the case docrine, reverse an earlier decision if it is convinced that the decision was "clearly erroneous." *Petition of United States Steel, supra*, 479 F.2d at 494. *See, generally*, 1B *Moore's Federal Practice*, ¶0.404 (particularly ¶0.404[8]).

This matter can be resolved by reviewing the changes in circumstances which have occurred since Judge Glasser's decision.

Since Judge Glasser entered his decision on July 13, 1984, two very significant changes in circumstances have occurred: (1) the FCC's *Bill Correctors* decision, and (2) the

JPML's transfer of the *Kaplan* case to this court.

First, when Judge Glasser entered his decision, he could not have known that the FCC would hold in *Bill Correctors* that it would regulate not only the carriers' billing practices, but the way in which those practices were disclosed to customers. The FCC's decision to take jurisdiction over all aspects of this litigation significantly undercuts the argument made by plaintiff Kaplan that his federal common law claims are not subsumed within the basic Communications Act claim that is within the primary jurisdiction of the FCC.

Further, if this court were to rule on the legality of the carriers' disclosure practices under the federal common law, despite the FCC's decision in *Bill Correctors* to regulate those practices under the Communications Act, it is now clear that there is a significant risk that the court and the FCC might reach irreconcilable results. This is precisely the type of conflict between judicial and administrative action that the preemption and primary jurisdiction doctrines were intended to avoid. *See, e.g., United States v. Western Pacific Railroad Co.*, 352 U.S. 59 (1956); *Far East Conference v. United States*, 342 U.S. 570 (1952).

Finally, the *Bill Correctors* decision reinforces the argument made by the USTS that the FCC is capable of giving plaintiff Kaplan and other customers any and all relief to which they may be entitled, and that there is no supplementary role for a court to play. In all of these ways, the intervening *Bill Correctors* decision makes USTS's arguments for dismissal more compelling, and justifies reconsideration of Judge Glasser's decision.

Second, the posture of the *Kaplan* case has now been fundamentally changed by the JPML's decision to transfer the case to this court. One of the basic purposes of the multidistrict process, and of the JPML's transfer orders in this case, is to achieve consistent rulings on the common issues among the transferred cases. The issues of primary

jurisdiction and preemption which defendant herein raised on its motion before Judge Glasser are at the very heart of these controversies, and this court must be free to reexamine and reconcile any prior inconsistent rulings by transferor courts. *In re First National Bank, Heavener, Oklahoma, First Mortgage Revenue Bonds Securities Litigation*, 451 F.Supp. 995 (JPML 1978); *In re Exterior Siding and Aluminum Coil Antitrust Litigation*, *supra*, 696 F. 2d at 616.

Judge Glasser himself recognized, in certifying his partial denial of defendant's motion to dismiss for immediate appeal, that there were substantial grounds for difference of opinion on the issues of law he decided. Because this court has ruled on the issues USTS raised in deciding the other defendants' motion to dismiss the consolidated complaint, the usual rationale for applying the "law of the case" doctrine is absent in this case. The purpose of that doctrine is to protect the courts from the burdens that would be placed on them if they were continually asked to readdress issues that had already been decided. *See* 1B *Moore's Federal Practice*, ¶0.404 [4.-1]. However, where, as here, the court has ruled on those very same issues in the other multidistrict cases that are before it, the invocation of the doctrine will not conserve any judicial resources, but will instead simply frustrate the goals of uniformity and fairness that the multidistrict transfers were meant to achieve.

Therefore, for the foregoing reasons, defendants' motion herein is granted, and plaintiff's federal common law claims are hereby dismissed, and the case referred to the FCC for determination.

IT IS SO ORDERED.

/s/ ANNA DIGGS TAYLOR

ANNA DIGGS TAYLOR
U.S. District Judge

Dated: June 27, 1985

APPENDIX G

Judicial Panel on
Multidistrict Litigation
Filed
Aug. 15, 1984
PATRICK D. HOWARD
Clerk of The Panel

DOCKET NO. 598

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE LONG DISTANCE TELECOMMUNICATIONS LITIGATION

TRANSFER ORDER*

This litigation presently consists of ten actions pending in seven federal districts: three actions in the Northern District of Illinois, two actions in the District of Massachusetts and one action each in the Northern District of California, the Eastern District of New York, the District of Minnesota, the District of New Jersey and the Middle District of Pennsylvania.[1] Before the Panel is a motion, pursuant to 28 U.S.C. §1407, by plaintiffs in seven of the ten actions to centralize the actions in this litigation in

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* Judge Milton Pollack recused himself and took no part in the decision of this matter.

[1] The Panel staff has been advised of the pendency in federal district courts of at least four additional related actions. These actions, and any other related actions that come to the Panel's attention, will be treated as potential tag-along actions. See Rules 9 and 10, R.P.J.P.M.L., 89 F.R.D. 273, 278-80 (1981).

the Northern District of Illinois[2] for coordinated or consolidated pretrial proceedings.[3] Plaintiffs in two actions and one telephone company defendant oppose centralization of all actions; some of these parties favor formation by the Panel of separate multidistrict proceedings in different districts for actions against different defendants. Four telephone company defendants support transfer to the Eastern District of Michigan. Other potential transferee forums suggested by the parties include the Eastern District of New York, the District of New Jersey and the Middle District of Pennsylvania.

On the basis of the papers filed and the hearing held, the Panel finds that these ten actions involve common

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[2] The Section 1407 movants originally sought transfer to either the Northern District of Illinois or the Eastern District of Michigan, but they subsequently deleted their request for transfer to the Eastern District of Michigan.

[3] The Section 1407 motion included four additional actions – *Control Electronics, Inc., et al. v. Southern Pacific Communications Co., et al.* E.D. Michigan, C.A. No. 83-1010; *Retail Recruiters of New York, Inc., v. MCI Telecommunications Corp.*, S.D. New York, C.A. No. 83-8048; *Harvey M. Schuster, et al. v. GTE Sprint Communications Corp.*, N.D. California, C.A. No. C-83-5374 TEH; and *Roger Lee, et al. v. Western Union Telegraph Co.*, N.D. California, C.A. No. C-84-1472 TEH – that are no longer pending in federal district courts. Judge Anna Diggs Taylor dismissed *Control Electronics* on May 22, 1984, and Judge Constance Baker Motley dismissed *Retail Recruiters* on June 29, 1984. Appeals of the dismissals in these two actions are pending in the United States Courts of Appeals for the Sixth Circuit and the Second Circuit, respectively. Judge Thelton E. Henderson dismissed *Schuster* and *Lee* on August 3, 1984.

Also, one of the ten actions now before the Panel, *Lily M. Feitler v. GTE Sprint Communications Corporation*, M.D. Pennsylvania, C.A. No. CV-84-0759, was not included in the Section 1407 motion, but this action is included in the matter before us because all parties to this action have stated in writing their respective positions on the motion before us and have presented oral argument.

questions of fact and that centralization of nine of these ten actions under Section 1407 in the Eastern District of Michigan will best serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation.[4] Each of the actions before the Panel challenges the billing and advertising practices of one of five long distance telephone company defendants and is brought as a purported class action on behalf of customers of that telephone company. Those parties that oppose centralization of all actions argue that actions against different defendants share few questions of fact because each defendant telephone company has its own unique billing practices, advertising, rate structure and disclosure policy. While we recognize that much discovery directed at different defendants will be cumulative rather than duplicative, we are persuaded that all the actions in this docket present sufficient common questions of fact, pertaining in particular to common practices in the long distance telephone industry, to meet the threshold requirement for Section 1407 transfer. Moreover, we note that 1) Section 1407 empowers the Panel to order transfer "for coordinated or consolidated pretrial proceedings"; 2) the Panel has customarily left to the discretion of the transferee judge the manner and extent of coordination or consolidation of pretrial proceedings; and 3) the transferee judge has the discretion to schedule discovery unique to any defendant to proceed concurrently with the discovery common to all defendants. We conclude that centralization under Section 1407 of the nine actions listed on the attached Schedule A is necessary in order to eliminate duplicative discovery, avoid inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary.

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[4] In light of the pendency of an appeal pursuant to 28 U.S.C. §1292(b) in the tenth action, *Charles Kaplan v. ITT-U.S. Transmission Systems, Inc.*, E.D. New York, C.A. No. 83-Civ-4843, our decision regarding transfer of that action under Section 1407 is deferred until the appeal is resolved.

None of the forums suggested by the parties as potential transferee districts could be characterized as the nexus of this litigation, involving the practices of several long distance telephone companies that do business nationwide. On balance, however, we are persuaded that the Eastern District of Michigan is the appropriate transferee forum. Even though no constituent action is presently pending in the Eastern District of Michigan, *Control Electronics* was commenced in that district in March, 1983, more than seven months before the commencement of any other action in this litigation. In addition, *Control Electronics* is broader in scope than other actions in this litigation in that, unlike those other actions, the complaint in *Control Electronics* names multiple telephone company defendants. We observe that Judge Taylor, the judge to whom we are assigning this litigation, presided over pretrial proceedings in *Control Electronics* for nearly a year, considered and decided defendants' dismissal motion, and has thus become familiar with a broad range of issues and parties in this litigation. Opponents of transfer to the Eastern District of Michigan point out that Judge Taylor dismissed the complaint in *Control Electronics* principally on the basis of the primary jurisdiction of the Federal Communications Commission (FCC). These parties further point out that primary jurisdiction is a legal issue that is germane to other actions before the Panel. Thus, these parties argue, centralization before Judge Taylor will in effect constitute a consignment of the entire litigation to the FCC. In response to this argument, we observe that the primary jurisdiction issue in *Control Electronics* has not yet been definitively resolved, in view of the pendency before the United States Court of Appeals for the Sixth Circuit of plaintiffs' appeal from Judge Taylor's order dismissing the complaint.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. §1407, the actions listed on the attached Schedule A be, and the same hereby are, transferred to the Eastern District of Michigan and, with the consent of that court, assigned to the Honorable Anna Diggs Taylor for coordinated or consolidated pretrial proceedings.

FOR THE PANEL:

/s/ ANDREW A. CAFFREY

Andrew A. Caffrey
Chairman

SCHEDULE A

MDL-598 -- In re Long Distance Telecommunications Litigation

Northern District of California

Roger Lee, et al. v. MCI Telecommunications Corp., C.A. No. C-84-1471JPV

District of Massachusetts

Euromarket Designs, Inc., d/b/a Crate and Barrell v. MCI Telecommunications Corp., C.A. No. 84-880

Euromarket Designs, Inc., d/b/a Crate and Barrell v. Allnet Communications Services, Inc., C.A. No. 84-881

District of Minnesota

McIntosh Embossing, Inc. v. MCI Telecommunications Corp., C.A. No. 4-84-Civ-271

District of New Jersey

Mark Hochman, et al. v. GTE Corp., et al., C.A. No. 83-4555

Northern District of Illinois

Certified Collateral Corp. v. MCI Telecommunications Corp., C.A. No. 84-C-0388

Earl E. Olive v. Allnet Communication Services, Inc., C.A. No. 84-C-1112

David H. Locks v. U.S. Telephone of Midwest, Inc., C.A. No. 84-C-1465

Middle District of Pennsylvania

Lily M. Feitler v. GTE Sprint Communcations Corporation, C.A. No. CV-84-0759

APPENDIX H

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, CHANCERY DIVISION

SPEAKERS OF SPORT, INC., on its own behalf and on behalf of all others similarly situated,
Plaintiff,

vs.

U.S. TELEPHONE, INC. and U.S. TELEPHONE OF THE MIDWEST, INC.,
Defendants.

No. 84L3247

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiff, Speakers of Sport, Inc., by its attorneys, states as follows:

1. This is an action for damages and injunctive relief from improper overcharges in telephone service under principles of common law fraud, breach of contract and for violation of *Ill.Rev.Stat.* Ch. 121-1/2 §262 *et. seq.* for deceptive practices and *Ill.Rev.Stat.* Ch. 121 1/2 §312 for deceptive trade practices.

2. The plaintiff is an Illinois corporation with its principal place of business in Northbrook, Illinois.

3. Defendant U.S. Telephone, Inc. is a foreign corporation with its principal place of business in Dallas, Texas. Defendant U.S. Telephone of the Midwest, Inc. is an Illinois corporation with its principal place of business located in Chicago, Illinois. Both defendants transact business within the state of Illinois and both sell long distance telephone discount services.

CLASS ACTION ALLEGATIONS

4. This action is brought by plaintiffs under Section 2-801 of the Code of Civil Procedure of Illinois on behalf of a class of all persons:

(a) who are now or have been at sometime in the past customers of U.S. Telephone and U.S. Telephone of the Midwest; and

(b) who were improperly charged by either defendant for services during the past.

5. The members of the plaintiff class are so numerous that joinder of all members is impractical. Plaintiff is informed and believes that the class members number several thousand.

6. There are questions of law and fact common to the class and to the subclass which predominate over any questions involving only individual members, including but not limited to:

(a) whether the defendants have improperly charged class members for telephone calls which were not completed;

(b) whether the defendants' improper charges for uncompleted calls begin after only six rings;

(c) whether it takes approximately 48 seconds for a phone to ring six times;

(d) whether a class member can be charged one minute or more for uncompleted calls as a result of letting the telephone ring six or more times;

(e) whether defendants improperly charged for rings prior to completed calls;

(f) whether the defendants' charges were unjust and unreasonable;

(g) whether the actions complained of herein constitute a fraud at common law perpetrated against the members of the class;

(h) whether the actions of defendants complained of herein constitute a breach of a written contract between

defendants and the members of the class;

(i) whether the conduct of the defendants complained of herein constitutes a violation of the Illinois Consumer Fraud and Deceptive Practices Act;

(j) whether the conduct of defendants complained of herein constitutes a violation of the Uniform Deceptive Trade Practices Act;

(k) whether defendants' conduct was willful and wanton so as to give rise to punitive damages.

7. The claims of the plaintiff are typical of the claims of the class and of the subclass.

8. Plaintiff will fairly and adequately protect the interests of the class and of the subclass it seeks to represent.

9. A class action is an appropriate method for the fair and efficient adjudication of this controversy.

BACKGROUND FACTS

10. Defendants own and operate a large long distance telephone communications network covering several states.

11. Defendants provide discounted long distance rates to its commercial and residential customers through microwave transmissions.

12. Defendants furnish their customers with rate schedules which defendants routinely send to their customers.

13. Defendants regularly advertise that their rates are less expensive than those of the Bell network.

14. Defendants send their commercial and residential customers itemized bills listing the calls made on a monthly basis.

15. Plaintiff has purchased defendants' services for a substantial period of time.

CHALLENGED PRACTICES OF DEFENDANTS

16. Defendants have engaged in a scheme and course of conduct whereby defendants charge their customers for calls which are not completed.

17. The fact that these charges would be made was never at any time disclosed in:

(a) the defendants' F.C.C. filings;

(b) the defendants' rate schedules sent to their residential customers;

(c) the defendants' rate schedules sent to their commercial customers; and

(d) any of the defendants' advertising.

18. According to the defendants' practice, these improper charges were reversed by defendants *only* if discovered by the customer and reported to the defendants.

19. Defendants' billing procedures make it unlikely that a customer would discover these improper charges and difficult to have such charges reversed.

20. The improper charges imposed by defendants pursuant to the scheme and plan against their subscribers are and were accomplished by means which include, but are not limited to, the following:

(a) If defendants' customer makes a call which is not completed and permits the telephone to ring six times or more, the customer will be charged a minute or more for this uncompleted call.

(b) If defendants' customer makes a call which is completed, yet rings six times or more before it is answered, the customer may be charged a minute or more in addition to any actual communication.

21. The scheme and fraudulent course of conduct described above was and is carried out with the full knowledge of defendants and was and is perpetuated with the intent that members of the plaintiff class would rely on the misrepresentations and omissions.

22. The improper additional charges described in paragraph 20, *supra*, were imposed deliberately, knowingly and with the intention to deceitfully and fraudulently obtain moneys from class members to which the defendants were not and knew they were not entitled. Defendants have repeatedly been advised of the existence of their improper overcharging practices through their subscribers' complaints and otherwise, but continue such practices.

23. The misrepresentations described above were material. Plaintiff and the plaintiff class were misled and deceived by them, relied to their detriment upon them, and were, by their reliance on defendants' omissions and misstatements, directly and proximately damaged.

COUNT I
FRAUD

24. Plaintiff repeats and repleads Paragraphs 1-23 as if fully set forth herein.

25. Defendants' conduct as described above involved material fraudulent representations to plaintiff concerning their rates which were false and known by defendants to be false at the time they were made, including but not limited to:

(a) the representations that customers would only be charged for completed calls;

(b) the representation that billing would begin only after the call was answered;

(c) the representation that defendants' rates were significantly lower than those of the Bell System.

26. Defendants' conduct as described above involved fraudulent omissions. These omissions did and were intended to mislead and deceive the plaintiff class, and include but are not limited to:

(a) defendants omitted disclosure that charges would be made for incomplete calls;

(b) defendants omitted disclosure that to avoid these charges one would have to hang up before six rings;

(c) defendants omitted disclosure that six or more rings prior to a completed call might involve additional charges;

(d) defendants omitted disclosure in its advertisements that defendants' rates might not be significantly lower than the Bell System's rates;

(e) defendants omitted to inform the class that if the improper charges were reported, as stated in paragraph 18 above, the charges would be reversed.

27. Members of the plaintiff class believed and reasonably relied to their detriment on defendants' misrepresentations and omissions in becoming and remaining subscribers to defendants and were thereby damaged in the amount of all improper charges imposed on them, plus interest and inconvenience caused thereby.

28. Defendants' conduct in committing the fraud described above was done willfully and/or recklessly and in wanton disregard of the rights of the class members and defendants' obligations under the common and statutory laws, entitling plaintiff and the members of the class to punitive damages.

WHEREFORE, plaintiff respectfully requests this Court to enter judgment in the class' favor and against defendants, including an order that:

(a) defendants be required to account to the plaintiff class for all improper overcharges;

(b) defendants be required to pay the class an amount equal to all such overcharges, plus interest from the date imposed, and a compensatory amount for inconvenience;

(c) the plaintiff class be awarded their costs incurred in connection with this action, including the award of attorneys' fees;

(d) the plaintiff class be awarded punitive damages in an

amount of three times the actual damages incurred;

(e) defendants be permanently enjoined from imposing improper overcharges; and

(f) the plaintifff class be awarded such further relief as this Court deems appropriate.

COUNT II
BREACH OF CONTRACT

29. Plaintiff repeats and repleads Paragraphs 1-23 as if fully set forth herein.

30. Defendants' conduct as described above has breached the written and implied contract existing between plaintiffs and defendants in, but not limited to, the following ways:

(a) that customers would only be charged for completed calls;

(b) that billing would begin only after the call was answered;

(c) that defendants' rates were significantly lower than the Bell System's rates.

31. As a direct and proximate result of defendants' breach of contract, the plaintiff class have been damaged in the amount of all improper charges imposed on them as subscribers of defendants and have suffered inconvenience caused thereby.

32. Defendants' conduct in breaching the contract as described above was done willfully and in wanton disregard of the rights of the plaintiff class and its obligations under the common and statutory laws of Illiois, entitling the plaintiff class to punitive damages.

WHEREFORE, plaintiff respectfully requests this Court to enter judgment in the class' favor and against the defendants, including an order that:

(a) defendants be required to account to the plaintiff class for all improper overcharges;

(b) defendants be required to pay to the plaintiff class an amount equal to all such overcharges, plus interest from the date imposed;

(c) the plaintiff class be awarded their costs incurred in connection with this action, including the award of attorneys' fees;

(d) the plaintiff class be awarded punitive damages in an amount of three times the actual damages incurred;

(e) defendants be permanently enjoined from imposing any improper overcharges;

(f) the plaintiff class be awarded such further relief as this Court deems appropriate.

COUNT III
UNIFORM DECEPTIVE TRADE PRACTICES ACT

33. Plaintiff repeats and repleads Paragraphs 1-23 as if fully set forth herein.

34. Defendants' conduct violated *Ill.Rev.Stat.*, Ch. 121-1/2 §312, which provides in pertinent part that:

> A person engages in a deceptive trade practice when, in the course of business . . . (it)
>
> (5) represents that . . . services have . . . characteristics . . . benefits or qualities that they do not have . . . .
>
> (9) advertises goods or services with intent not to sell them as advertised;
>
> (12) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

35. Defendants' violation of §312 includes, but is not limited to, the following:

(a) defendants' representations that customers would be charged only for completed calls;

(b) defendants' representations that billing would begin only after the call was answered;

(c) defendants' representations that defendants' rates were lower than Bell's;

(d) defendants' billing procedures, which made it difficult and unlikely for a customer to discover these improper charges.

36. As a direct and proximate result of defendants' violation of §312, the plaintiff class has been damaged in the amount of all improper charges imposed on it, and has suffered inconvenience caused thereby.

WHEREFORE, plaintiff respectfully requests this Court to enter judgment in favor of the class and against the defendants including an order that:

(a) defendants be required to account to all plaintiffs for all improper overcharges;

(b) defendants be required to pay to the plaintiffs an amount equal to all such overcharges, plus interest from the date imposed and compensatory amount for inconvenience;

(c) the plaintiffs be awarded their costs incurred in connection with this action, including the award of attorneys' fees pursuant to *Ill.Rev.Stat.*, ch. 121-1/2, §313;

(d) the plaintiffs be awarded punitive damages in an amount of three times the actual damages incurred;

(e) defendants be permanently enjoined from imposing any improper overcharges; and

(f) the plaintiffs be awarded such further relief as this Court deems appropriate.

COUNT IV
ILLINOIS CONSUMER FRAUD AND DECEPTIVE PRACTICES ACT

37. Plaintiff repeats and repleads Paragraphs 1-23 as if fully set forth herein.

38. Defendants' conduct violates *Ill.Rev.Stat.*, ch. 121-1/2 §262, which declares unlawful:

> . . . unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud (sic), false promise, misrepre-

> sentation or the concealment, suppression or omission of any material facts, with the intent that others rely upon the concealment, supression (sic) or omission of such material fact . . . in the conduct of any trade or commerce . . . whether any person has in fact been misled or damaged thereby. . . .

39. Defendants' violation of §262 includes, but is not limited to, the following:

(a) defendants' failure to disclose that charges would be made for uncompleted calls is an intentional fraud, deceptive practice, suppression, concealment and omission to state a material fact in violation of §262;

(b) defendants' failure to disclose that in order to avoid these charges one would have to hang up before six rings is an intentional fraud, deceptive practice, suppression, concealment and an omission to state a material fact under §262;

(c) defendants' failure to disclose that six or more rings prior to a completed call might involve additional charges is an intentional fraud, deceptive practice, suppression, concealment and omission to state a material fact under §262; and

(d) defendants' failure to disclose in its advertisements that their rates might not be significantly lower than the Bell System's rate is an intentional fraud, deceptive practice, suppression, concealment and omission to state a material fact under §262.

40. As a direct and proximate result of defendants' violation of §262, the members of the plaintiff class have been damaged in the amount of all improper charges imposed on them, plus interest and inconvenience caused thereby.

41. The defendants' conduct in violation of §262 was done willfully and in wanton disregard of the Consumer Fraud and Deceptive Practices Act and of numerous other provisions of Illinois statutory and common law, entitling plaintiffs to punitive damages.

WHEREFORE, plaintiff respectfully requests this Court to enter judgment in favor of the plaintiffs and

against defendants, including an order that:

(a) defendants be required to account to the plaintiffs for all improper overcharges;

(b) defendants be required to pay to the plaintiffs an amount equal to all such overcharges, plus interest from the date imposed and a compensatory amount for inconvenience;

(c) the plaintiffs be awarded their costs incurred in connection with this action, including the award of attorneys' fees pursuant to *Ill.Rev.Stat.*, ch. 121-1/2 §270a(c);

(d) the plaintiffs be awarded punitive damages in an amount of three times the actual damages incurred;

(e) defendants be permanently enjoined from imposing any improper overcharges; and

(f) the plaintiffs be awarded such further relief as this Court deems appropriate.

/s/ CHARLES BARNHILL

CHARLES BARNHILL
Attorney for the Plaintiff Class

DAVIS, MINER, BARNHILL
& GALLAND, P.C.
14 West Erie Street
Chicago, IL 60610
(312) 751-1170

DATED: February 13, 1984

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID H. LOCKS, on his own behalf and on behalf of all others similarly situated,
Plaintiff,

v.

U.S. TELEPHONE OF THE MIDWEST, INC.,
Defendant.

No. 84C1485

JURY DEMANDED

CLASS ACTION COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF

Plaintiff, David H. Locks, through his attorneys, for his complaint against the defendant, U.S. Telephone of the Midwest, Inc. ("U.S. Telephone"), states as follows:

1. This is an action under 47 U.S.C. § 201 *et seq.* for damages and injunctive relief from improper overcharges in telephone service; under principles of common law fraud and breach of contract; and for violation of Ill. Rev. Stat. ch. 121-1/2, § 262 *et seq.* for deceptive practices and Ill. Rev. Stat. ch. 121-1/2, § 312 for deceptive trade practices.

JURISDICTION AND VENUE

2. Jurisdiction is predicated upon 28 U.S.C. § 1331, 28 U.S.C. § 1337, 47 U.S.C. § 207, and upon principles of pendent jurisdiction.

3. The plaintiff is a U.S. Telephone subscriber who resides in Chicago, Illinois.

4. Defendant, U.S. Telephone is a corporation organized under the laws of the State of Texas. It is qualified to

do business and is doing business in Illinois.

5. Jurisdiction is proper under 47 U.S.C. § 207, which provides:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make a complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction . . . .

6. Venue lies in this district under 28 U.S.C. § 1391 as the defendant is qualified to do business in this district and is doing business in this district.

CLASS ACTION ALLEGATIONS

7. This action is brought by palintiff under Rule 23b(1), b(2) and b(3) of the Federal Rules of Civil Procedure on behalf of a class of all persons:

(a) who are now or have been at some time in the past ten years customers of U.S. Telephone; and

(b) who were improperly charged by defendant U.S. Telephone for services during the past ten years.

8. Counts IV and V are brought on behalf of a subclass of the class which is described in paragraph 7. The subclass includes all members of the class who are residents of the State of Illinois.

9. The members of the plaintiff class and of the subclass are so numerous that joinder of all members is impractical.

10. There are questions of law and fact common to the class and to the subclass which predominate over any questions involving only individual members, including but not limited to:

(a) whether the defendant has improperly charged

class members for telephone calls which were not completed;

(b) when the defendant's improper charges for uncompleted calls begin;

(c) whether a class member can be charged for uncompleted calls;

(d) whether the defendant improperly charges for rings prior to completed calls;

(e) whether the defendant's charges were unjust and unreasonable;

(f) whether the conduct of defendant complained of herein violates Title 47 of the United States Code;

(g) whether the actions complained of herein constitute a fraud at common law perpetrated against the members of the class;

(h) whether the actions of defendant complained of herein constitute a breach of the written contract between defendant and the members of the class;

(i) whether defendant's conduct was willful and wanton so as to give rise to punitive damages.

11. The claims of the plaintiff are typical of the claims of the class and of the subclass.

12. Plaintiff will fairly and adequately protect the interests of the class and of the subclass he seeks to represent.

13. A class action is an appropriate method for the fair and efficient adjudication of this controversy.

BACKGROUND FACTS

14. U.S. Telephone owns and operates a long distance telephone communications network covering all of the continental United States.

15. Pursuant to Title 47 of the United States Code, U.S. Telephone files a schedule of its tariffs with the

Federal Communications Commission (the "F.C.C" or the "Commission").

16. U.S. Telephone advertises that its rates are significantly lower than those of AT&T.

17. U.S. Telephone bills its customers for calls on a monthly basis.

CHALLENGED PRACTICES OF DEFENDANT

18. Defendant has engaged in a scheme and course of conduct whereby defendant charges its customers for calls which are not completed.

19. The fact that these charges would be made was never at any time disclosed in either the defendant's F.C.C. filings or any of the defendant's advertising.

20. According to the defendant's practice, these improper charges are reversed by the defendant *only* if discovered by the customer and reported to the defendant.

21. Defendant's billing procedure makes it unlikely that a customer would discover these improper charges, and difficult to have such charges reversed.

22. The improper charges imposed by defendant pursuant to the scheme and plan against its subscribers are and were accomplished by means which include, but are not limited to, the following:

(a) If a U.S. Telephone customer makes a call which is not completed, the customer will be charged for this uncompleted call.

(b) If a U.S. Telephone customer makes a call which is completed, yet rings several times before it is answered, the customer may be charged for ringing time in addition to any actual communication.

23. The scheme and fraudulent course of conduct described above was and is carried out with the full knowledge of defendant and was and is perpetuated with the

intent that members of the plaintiff class would rely on the misrepresentations and omissions.

24. The improper additional charges described in paragraph 22, *supra*, were imposed deliberately, knowingly and with the intention to deceitfully and fraudulently obtain moneys from class members to which the defendant was not and knew it was not entitled. Defendant has repeatedly been advised of the existence of its improper overcharging practices through its subscribers' complaints and otherwise, but continues such practices.

25. The misrepresentations described above were material. The plaintiff class were misled and deceived by them, relied to their detriment upon them, and were, by their reliance on defendant's omissions and misstatements, directly and proximately damaged.

COUNT I
VIOLATION OF TITLE 47

26. Plaintiff repeats and repleads paragraphs 1-25 as if fully set forth herein.

27. Defendant's conduct violated 47 U.S.C. § 201(b), which provides in pertinent part:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification or regulation that is unjust or unreasonable is declared to be unlawful.

28. Defendant's conduct violated 47 U.S.C. § 203(c), which provides in pertinent part:

> No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communications, or

for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect.

29. Defendant's violation of § 201(b) and § 203(c) include, but are not limited to, the charging, demanding, and receiving greater compensation for their services than their F.C.C. schedule of charges indicated, and the imposition of unjust and unreasonable charges.

30. Defendant's violations of § 201(b) and § 203(c) include, but are not limited to, the following:

(a) charging customers for uncompleted calls;

(b) beginning to bill customers before many completed calls were answered.

31. As a direct and proximate result of defendant's violations of § 201(b) and § 203(c), plaintiff and the members of the plaintiff class have been damaged in the amount of all improper charges imposed on them, plus inconvenience caused thereby.

WHEREFORE, plaintiff respectfully requests this Court to enter judgment in favor of the plaintiff class and against the defendant including an order that:

(a) defendant be required to account to the plaintiff class for all improper overcharges;

(b) defendant be required to pay to the plaintiff class an amount equal to all such overcharges, plus interest from the date imposed, and a compensatory amount for inconvenience;

(c) the plaintiff class be awarded their costs incurred in connection with this action, including the award of reasonable attorneys' fees, pursuant to 47 U.S.C. § 206.

(d) the plaintiff class be awarded punitive damages in an amount of three times the actual damages incurred;

(e) defendant be permanently enjoined from imposing any improper overcharges;

(f) the plaintiff class be awarded such further relief as this Court decrees appropriate.

COUNT II
FRAUD

32. Plaintiff repeats and repleads paragraphs 1-25 as if fully set forth herein.

33. Defendant's conduct as described above involved material fraudulent representations to plaintiff concerning its rates which were false and known by defendant to be false at the time they were made, including but not limited to:

(a) the representation that customers would only be charged for completed calls;

(b) the representation that billing would begin only after the call was answered and that the customers would pay for only what they used;

(c) the representation that U.S. Telephone's rates were significantly lower than those of AT&T.

34. Defendant's conduct as described above involved fraudulent omissions. These omissions did and were intended to mislead and deceive the plaintiff class, and include but are not limited to:

(a) defendant omitted disclosure that charges would be made for incomplete calls;

(b) defendant omitted disclosure that rings prior to a completed call might involve additional charges;

(c) defendant omitted disclosure that U.S. Telephone's rates might not be signicantly lower than AT&T's rates;

(d) defendant omitted to inform the class that if the improper charges were reported, as stated in Paragraph 20 above, the charges would be reversed.

35. Members of the plaintiff class believed and reasonably relied to their detriment on defendant's misrepresentations and omissions in becoming and remaining subscribers to U.S. Telephone and were thereby damaged in the amount of all improper charges imposed on them, plus interest and inconvenience caused thereby.

36. Defendant's conduct in committing the fraud described above was done willfully and/or recklessly and in wanton disregard of the rights of the class members and defendant's obligations under the laws, entitling plaintiff and the members of the class to punitive damages.

WHEREFORE, plaintiff respectfully requests this Court to enter judgment in the class' favor and against defendant, including an order that:

(a) defendant be required to account to the plaintiff class for all improper overcharges;

(b) defendant be required to pay the class an amount equal to all such overcharges, plus interest from the date imposed, and a compensatory amount for inconvenience;

(c) the plaintiff class be awarded their costs incurred in connection with this action, including the award of attorneys' fees;

(d) the plaintiff class be awarded punitive damages in an amount of three times the actual damages incurred;

(e) defendant be permanently enjoined from imposing improper overcharges;

(f) the plaintiff class be awarded such further relief as this Court deems appropriate.

COUNT III
BREACH OF CONTRACT

37. Plaintiff repeats and repleads paragraphs 1-25 as if fully set forth herein.

38. Defendant's conduct as described above has breached the written and implied contract existing between plaintiffs and defendant in, but not limited to, the following ways:

(a) customers were charged for uncompleted calls;

(b) billing did not begin only after the call was answered;

(c) in many instances U.S. Telephone's rates were not significantly lower than AT&T's rates.

39. As a direct and proximate result of defendant's breach of contract, the members of the plaintiff class have been damaged in the amount of all improper charges imposed on them as subscribers of U.S. Telephone, and have suffered inconvenience caused thereby.

40. Defendant's conduct in breaching the contract as described above was done willfully and in wanton disregard of the rights of the plaintiff class and its obligations under the laws entitling the plaintiff class to punitive damages.

WHEREFORE, plaintiff respectfully requests this Court to enter judgment in the class' favor and against the defendant, including an order that:

(a) defendant be required to account to the plaintiff class for all improper overcharges;

(b) defendant be required to pay to the plaintiff class an amount equal to all such overcharges, plus interest from the date imposed;

(c) the plaintiff class be awarded their costs incurred in connection with this action, including the award of attorneys' fees;

(d) the plaintiff class be awarded punitive damages in an amount of three times the actual damages incurred;

(e) defendant be permanently enjoined from imposing any improper overcharges;

(f) the plaintiff class be awarded such further relief as this Court deems appropriate.

COUNT IV
UNIFORM DECEPTIVE TRADE PRACTICES ACT

41. Count IV is stated on behalf of the subclass of members of the plaintiff class who reside in Illinois ("Illinois plaintiffs").

42. Plaintiff repeats and repleads Paragraphs 1-25 as if fully set forth herein.

43. Defendant's conduct violates *Ill. Rev. Stat.*, ch. 121-1/2, § 312, which provides in pertinent part that:

> A person engages in a deceptive trade practice when, in the course of his business . . . (it)
>
> (5) represents that . . . services have . . . characteristics . . . benefits or qualities that they do not have . . . .
>
> (9) advertises goods or services with intent not to sell them as advertised;
>
> (12) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

44. Defendant's violation of § 312 includes, but is not limited to, the following:

(a) defendant's representations that customers would be charged only for completed calls;

(b) defendant's representations that billing would begin only after the call was answered;

(c) defendant's representations that U.S. Telephone's rates were lower than AT&T's;

(d) defendant's billing procedure, which made it difficult and unlikely for a customer to discover these improper charges.

45. As a direct and proximate result of defendant's violation of § 312, the plaintiff class has been damaged in the amount of all improper charges imposed on it, and has suffered inconvenience caused thereby.

WHEREFORE, plaintiff respectfully requests this Court to enter judgment in favor of the subclass of Illinois plaintiffs and against the defendant including an order that:

(a) defendant be required to account to all Illinois plaintiffs for all improper overcharges;

(b) defendant be required to pay to the Illinois plaintiffs an amount equal to all such overcharges, plus interest from the date imposed and a compensatory amount for inconvenience;

(c) the Iliinois (sic) plaintiffs be awarded their costs incurred in connection with this action, including the award of attorneys' fees pursuant of *Ill. Rev. Stat.*, ch. 121-1/2, § 313;

(d) the Illinois plaintiffs be awarded punitive damages in an amount of three times the actual damages incurred;

(e) defendant be permanently enjoined from imposing any improper overcharges;

(f) the Illinois plaintiffs be awarded such further relief as this Court deems appropriate.

COUNT V
ILLINOIS CONSUMER FRAUD AND DECEPTIVE PRACTICES ACT

46. Count V is stated on behalf of the subclass of members of the plaintiff class who reside in Illinois.

47. Plaintiff repeats and repleads paragraphs 1-25 as if fully set forth herein.

48. Defendant's conduct violates *Ill. Rev. Stat.*, ch. 121-1/2, § 262, which declares unlawful:

> . . . unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud (sic), false promise, misrepresentation or the concealment, suppression or omission of any material facts, with the intent that others rely upon the concealment, suppression or omission of such material fact . . . in the conduct of any trade or commerce . . . whether any person has in fact been misled or damaged thereby . . .

49. Defendant's violation of § 262 includes, but is not limited to, the following:

(a) defendant's failure to disclose that charges would be made for uncompleted calls is an intentional fraud, deceptive practice, suppression, concealment and omission to state a material fact in violation of § 262.

(b) defendant's failure to disclose more rings prior to a completed call might involve additional charges is an intentional fraud, deceptive practice, suppression, concealment and omission to state a material fact under § 262;

(c) defendant's failure to disclose in its advertisements that U.S. Telephone's rates might not be significantly lower than AT&T's rate is an intentional fraud, deceptive practice, suppression, concealment and omission to state a material fact under § 262.

50. As a direct and proximate result of defendant's violation of § 262, the members of the plaintiff class have been damaged in the amount of all improper charges imposed on them, plus interest and inconvenience caused thereby.

51. The defendant's conduct in violation of § 262 was done willfully and in wanton disregard of the Consumer Fraud and Deceptive Practices Act and of numerous other provisions of Illinois statutory and common law, entitling plaintiffs to punitive damages.

WHEREFORE, plaintiff respectfully requests this

Court to enter judgment in favor of the Illinois plaintiffs and against defendant, including an order that:

(a) defendant be required to account to the Illinois plaintiffs for all improper overcharges;

(b) defendant be required to pay to the Illinois plaintiffs an amount equal to all such overcharges, plus interest from the date imposed and a compensatory amount for inconvenience;

(c) the Illinois plaintiffs be awarded their costs incurred in connection with this action, including the award of attorneys' fees pursuant to *Ill. Rev. Stat.*, ch. 121-1/2, § 270a(c);

(d) the Illinois plaintiffs be awarded punitive damages in an amount of three times the actual damages incurred;

(e) defendant be permanently enjoined from imposing any improper overcharges;

(f) the Illinois plaintiffs be awarded such further relief as this Court deems appropriate.

Dated: February 16, 1984

SACHNOFF WEAVER & RUBENSTEIN, LTD.

/s/ JACK L. BLOCK

One of the Attorneys for Plaintiffs

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APPENDIX J

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article VI, Clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Federal Communications Act of 1934, 47 U.S.C. Sec. 151:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

Federal Communications Act of 1934, 47 U.S.C. Sec. 201 (b):

> (b) All Charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge,

practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: . . . The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

Federal Communications Act of 1934, 47 U.S.C. Sec. 202 (a):

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Federal Communications Act of 1934, 47 U.S.C. Sec. 203 (a) - (c):

(a) Every common carrier, exept connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may be regulation require, and each such schedule shall give notice of its

effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) (1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after ninety days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than ninety days.

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed, and published, in accordance with the provisions of this chapter, and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

Federal Communications Act of 1934, 47 U.S.C. Sec. 205 (a):

> (a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classificiation, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Federal Communications Act of 1934, 47 U.S.C. Sec. 206:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Federal Communications Act of 1934, 47 U.S.C. Sec. 207:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

Federal Communications Act of 1934, 47 U.S.C. Sec. 208:

> Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make preparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Federal Communications Act of 1934, 47 U.S.C. Sec. 209:

> If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter,

the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

Federal Communications Act of 1934, 47 U.S.C. Sec. 401 (b):

(b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

Federal Communications Act of 1934, 47 U.S.C. Sec. 402 (a):

Any proceeding to enjoin, set aside, annual, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

Federal Communications Act of 1934, 47 U.S.C. Sec. 407:

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the line of the carrier runs, or in any State court of general jurisdiction having jurisdiction of

the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suits the findings and order of the Commission shall be prima facie evidence of the facts therein stated, except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

United States Code, Title 28, Chapter 158, Section 2342:

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of – (1) all final orders of the Federal Communications Commission made reviewable by section 402 (a) of title 47; Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

Illinois Consumer Fraud and Deceptive Practices Act, Illinois Revised Statutes, Chapter 121 1/2, Sec. 262:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the fed-

eral courts relating to Section 59 (a) of the Federal Trade Commission Act.

Supreme Court, U.S.
FILED
OCT 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 87-286

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

U.S. TELECOM, INC. f/k/a U.S. TELEPHONE, INC., AND U.S. TELEPHONE OF THE MIDWEST, INC.,

Petitioner,

v.

SPEAKERS OF SPORT, INC., on its own behalf and on behalf of all others similarly situated,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE FIRST DISTRICT OF THE STATE OF ILLINOIS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Whether a state court decision refusing to dismiss claims of advertising and disclosure practices in violation of state and statutory common law presents any issue which is appropriately reviewable by this Court at this early stage of the proceedings.

SUPPLEMENTAL RULE 28.1 LIST

Speakers of Sport, Inc.

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Essential Communications Systems, Inc. v. American Telephone and Telegraph Co., 610 F.2d 1114 (3rd Cir. 1979) . 17

FCC v. Pottsville Broadcasting, Co., 309 U.S. 134 (1940). . . . 16

International Paper Company v. Oullette, ___ U.S. ___, 107 S.Ct. 805 (1987). 13,14,18

Ivy Broadcasting Co. v. American Telephone and Telegraph Co., 391 F.2d 486 (2d Cir. 1968). 16

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No. 87-286

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

U.S. TELECOM, INC. f/k/a U.S. TELEPHONE, INC., AND U.S. TELEPHONE OF THE MIDWEST, INC.,
Petitioner,
v.

SPEAKERS OF SPORT, INC., on its own behalf and on behalf of all others similarly situated,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE APPELLATE COURT OF THE
FIRST DISTRICT OF THE
STATE OF ILLINOIS

BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent SPEAKERS OF SPORT, INC. ("SPEAKERS"), on its own behalf and on behalf of all others similarly situated,

respectfully requests that this Court deny the petition of U.S. TELECOM, INC. f/k/a U.S. TELEPHONE INC. AND U.S TELEPHONE OF THE MIDWEST, INC. ("US Tel" or "petitioner") for a writ of certiorari seeking review of the decision of the Appellate Court of Illinois.[1] In that decision, the Appellate Court denied petitioner's motion to dismiss SPEAKERS' state common law and statutory fraud claims as, inter alia, preempted by the Federal Communications Act ("the Communications Act"), 47 U.S.C. Sec. 151 (1982) and subject to the primary jurisdiction of the Federal Communications Commission ("the FCC"). Petitioner's request for leave to appeal was denied by the Illinois Supreme Court.

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[1] 149 Ill. App. 3d 898, 501 N.E. 2d 318 (1st Dist. 1986), appeal denied, 114 Ill. 2d 558, 508 N.E. 2d 736 (1987).

ADDITIONAL STATUTES INVOLVED

Section 414 of the Communications Act, 47 U.S.C. Sec. 414 (1982), states:

> Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

COUNTERSTATEMENT OF FACTS

SPEAKERS filed this action as a class action on behalf of all customers of US Tel alleging that by failing to disclose to its customers and potential customers that they would be systematically charged for uncompleted telephone calls, US Tel had engaged in common law fraud and violated the Illinois Consumer Fraud and Deceptive Business Practices Act and the Uniform Deceptive Trade Practices Act.[2] SPEAKERS also alleged that petitioner's conduct

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[2]Ill. Rev. Stat., 1986, Chapter 121 1/2, Secs. 261 et seq. and 312 et seq.

constituted common law breach of contract.

US Tel moved to dismiss the complaint on the ground that it was preempted by federal law, subject to the primary jurisdiction of the FCC, and duplicative of a similar action pending in federal court. The trial court granted the motion and SPEAKERS appealed. The Appellate Court reversed.

Following a recent Illinois Supreme Court decision in Kellerman v. MCI Telecommunications Corp., 112 Ill.2d 428, 493 N.E. 2d 1045 (1986),[3] the Court below held that although the

[3]Kellerman involved fraud claims against the defendant (MCI Telecommunications Corp. or "MCI") virtually identical to those raised here. MCI moved to dismiss on grounds of preemption and primary jurisdiction, and the trial court's denial of that motion was ultimately affirmed by the Illinois Supreme Court. Id. Last year, this Court denied MCI's petition for a writ of certiorari. Tele-communications Corp. v. Kellerman, ___U.S. ___, 107 S.Ct. 434 (1986).

Communications Act preempted claims challenging the quality of telecommunications services or the reasonableness of rates charged for said services, it did not preempt common law or statutory claims unrelated to those concerns. As a result, the Court concluded, SPEAKERS' damage claims for injury caused by US Tel's dissemination of fraudulent and deceptive advertisements were not preempted, and SPEAKERS was free to seek to hold US Tel to the same advertising and disclosure standards as any other firm, regardless of whether it was in other respects subject to federal regulation.

The Court also rejected the argument that the FCC had primary jurisdiction over SPEAKERS' claims. Finding that such claims raised no issue requiring the agency's specialized or technical expertise, it held that the trial court

had erred in dismissing them on this ground.[4]

REASONS FOR DENYING THE WRIT

The instant petition is virtually identical to the certiorari petition filed by MCI in the Kellerman case which this Court denied last year. See supra, note 1. Petitioner nonetheless contends that it should be granted, asserting conflicts with four cases decided by this Court under the Act of 1910 (the most recent decided sixty years ago), a number of federal district court decisions, and an administrative determination by the FCC. It contends further that state court proceedings, if

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[4]The Court below also rejected the claim that the case should be dismissed as duplicative of a pending federal suit, since none of the counts in the federal court action alleged state common law or statutory claims, and the disposition of that case therefore implicated none of the considerations of comity, multiplicity and res judicata that would justify dismissal.

permitted to continue, will have a disruptive effect on the reorganization of the telecommunications industry.

Plainly, the writ should be denied. This case presents neither a "conflict" as contemplated by Supreme Court Rule 17, nor any issue of sufficient importance to warrant this Court's concern.

First, the four cases decided under the Act of 1910 do not create any conflict warranting review. Not only are they distinguishable from the instant case, but this Court's more recent analyses of the preemption and primary jurisdiction doctrines fully support the decision of the Court below.

Second, notwithstanding that a number of federal district courts have reached different results with respect to different complaints (which included claims, not present here, that the charges were "unreasonable" or "unjust"

within the meaning of the Communications Act), those decisions do not create a conflict within the meaning of Supreme Court Rule 17. Moreover, at least one federal district court has held, on indistinguishable facts, that federal preemption is not warranted. Bruss Co. v. Allnet Communication Services, 606 F.Supp. 401 (N.D. Ill. 1985).

Third, there is no possibility of conflict between vindication of SPEAKERS' claims and the FCC interpretations on which US Tel relies. Far from immunizing US Tel from responsibility for SPEAKERS' claims, the FCC has endorsed the principle of disclosure as consistent with federal policy.

Finally, this case raises no issue of sufficient importance to warrant this Court's review at this early stage. US Tel has made no showing to support its contention that the litigation will, if

permitted to proceed, cause any disruption to the reorganization of the telecommunications industry. Indeed as a practical matter, it appears that resolution of the technical problem (lack of "answer supervision") alleged to have been fraudulently concealed is imminent. See In re: Certified Collateral Corp., et al. v. Allnet Communications Services, et al. ("Allnet"), FCC Dkt. No. E-86-61 (Released: April 14, 1987), para. 4. (Appendix E.) Thus, this action will not obstruct the accomplishment of any federal purpose.

I.

THE DECISIONS OF THIS COURT DO NOT CONFLICT WITH THE CONCLUSION THAT SPEAKERS' STATE LAW CLAIMS ARE NOT PREEMPTED

Petitioner's analysis of this Court's preemption decisions relies exclusively on cases decided sixty years

ago and more,[5] and disregards developments in the law over recent years. These developments have clarified and refined the law, and made clear that the earlier decisions are limited to their particular facts. That is, in each of the four cases cited by US Tel, the plaintiffs' claims related directly to the rates charged for telegraph services and limits on liability for the quality of those services. They therefore fell unmistakably within the scope of the Act of 1910, whose "outstanding consideration [was] that of uniformity and equality of rates." Esteve Bros., 256 U.S. at 572.

The plaintiffs in Warren-Godwin, Esteve Bros. and Priester each challenged

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[5] Postal Telegraph-Cable Co. v. Warren-Godwin Co., 251 U.S. 27 (1919); Western Union Telegraph Co. v. Boegli, 251 U.S. 315 (1920); Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U.S. 566 (1921), and Western Union Telegraph Co. v. Priester, 276 U.S. 252 (1928).

fixed rates for the transmission of "unrepeated" telegraph messages, i.e., messages sent at a discounted rate and therefore subject to a more limited liability than available under state negligence law. Such rates were expressly authorized by the Act of 1910 which permitted classification of messages "into day, night, repeated, unrepeated, letter, commercial, press, Government and such other classes as are just and reasonable." The Act also provided explicitly that "different rates may be charged for the different classes of messages." The plaintiff in Boegli, on the other hand, challenged a state law penalty for negligent failure to deliver a telegram. The federally fixed rates and limits on liability for unrepeated messages in the first three cases were enforced, and the state penalty in the fourth held preempted, all in furtherance

of the federal objective of ensuring uniform and equal rates.

By contrast, SPEAKERS' claims in this case do not relate to the statutory purpose of the Communications Act in ensuring quality service at uniform and reasonable rates. As demonstrated infra, current principles of law establish that their dismissal on preemption grounds is unwarranted.

II.

THE ANALYSIS OF THE COURT BELOW IS CONSISTENT WITH PRINCIPLES ESTABLISHED BY THIS COURT

A recent series of preemption decisions by this Court supports the conclusion of the Court below that SPEAKERS' state law claims are not preempted because they do not fall within the scope of, and do not create any irreconcilable conflict with, federal

law.[6] In Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984), for example, this Court set out the two basic ways in which state law can be preempted. Where Congress evidences an intent to occupy an entire field of activity, any state law within that field will be preempted. 464 U.S. at 248. Disputes will arise only as to whether a particular claim is or is not "within the field." Where federal legislation has not entirely displaced state regulation, as evidenced for example by a savings clause, state law is preempted only to the extent that it conflicts with federal law. This occurs either when compliance with both state and federal law is impossible, or when

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[6] Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984); California Federal Savings and Loan Association v. Guerra, ___ U.S. _____, 107 S.Ct. 683 (1987); International Paper Company v. Oullette, __ U.S. ____, 107 S.Ct. 805 (1987); Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976).

the state law in question obstructs the accomplishment of the legislative purpose. Id.[7]

The express purpose of Communications Act regulation is to

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[7]In Silkwood, the Court held that the plaintiff's state damage claims for injuries caused by radioactive contamination were not preempted by the Atomic Energy Act, by which act the federal government had "occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." Notwithstanding that the plaintiff's state claims for personal injury had not been expressly preserved, the Court relied on legislative history to conclude that Congress intended that they survive.

See also California Federal Savings and Loan Association v. Guerra, 107 S.Ct. at 689 (state law regulating pregnancy discrimination not preempted by federal law, where Congress explicitly disclaimed categorical preemption and the state law neither conflicted with federal law nor obstructed underlying federal policy); International Paper Company v. Oullette, 107 S.Ct. at 811-12 (state law not preempted by Clean Air Act where not inconsistent with Act, and thus within the scope of savings clause); Nader v. Allegheny Airlines, Inc., 426 U.S. at 300 (state law claims preserved by savings clause and not inconsistent with provisions or purposes of Federal Aviation Act).

monitor the quality of and rates charged for interstate telecommunications services in order to "'make available ... to all the people of the United States a rapid, efficient ... communication service with adequate facilities at reasonable charges.'" 47 U.S.C. Sec. 151. Thus, the Act's primary concern is with the quality and cost of service, as opposed to SPEAKERS' concern over standards for advertising to potential customers, the focus of SPEAKERS' concern in this case.

That Congress did not intend to supplant state laws addressing other concerns is evident from the Act's broad savings clause, 47 U.S.C. Sec. 414, which states that "[n]othing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such

remedies."[8] As long ago as 1940, this Court recognized that the Communications Act was not designed as a new code for the adjustment of private rights. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940). More recently, a federal court of appeals held that the effect of the Act's savings clause was to preserve state-law remedies that do not interfere with the federal government's authority over telephone charges or

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[8]Neither federal court of appeals decision cited by US Tel, Ivy Broadcasting Co. v. American Telephone and Telegraph Co., 391 F.2d 486, 490 (2d Cir. 1968) and Nordlicht v. New York Telephone Co., 799 F.2d 859 (2d Cir. 1986), cert. denied, 107 S.Ct. 929 (1987) so much as acknowledged the existence of the savings clause, perhaps because the claims in those cases related directly to the quality and rates of the service provided. The plaintiff in Ivy complained explicitly of "standards" of the service provided and the extent of the defendant's liability for failure to comply with such standards. The plaintiff in Nordlicht challenged the lawfulness of the defendant's charging practices.

services, and which did not otherwise conflict with an express provision of the Act. Comtronics, Inc. v. Puerto Rico Telephone Co., 553 F.2d 701, 707-08, n.6 (1st Cir. 1977).[9]

The conclusion of the Court below that SPEAKERS' claims are not preempted presents no conflict with decisions of this Court. Although federal law clearly

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[9]See also Kellerman, 112 Ill.2d at 440-41; Ashley v. Southwestern Bell Telephone Co., 410 F.Supp. 1389 (W.D. Texas 1976)(plaintiff's invasion of privacy tort action against the telephone company for disclosure of telephone records and wiretaps held not preempted by Communications Act); Cable Vision, Inc. v. KUTV, Inc., 211 F.Supp. 47 (D. Idaho 1962) rev'd on other grounds, 335 F.2d 348 (9th Cir. 1964) cert. denied 379 U.S. 989 (1965)(contractual dispute not related to the rendition of interstate communication services held not preempted by the Communications Act); Essential Communications Systems, Inc. v. American Telephone and Telegraph Co., 610 F.2d 1114, 1120-21 (3rd Cir. 1979) and Sound, Inc. v. American Telephone and Telegraph Co., 631 F.2d 1324, 1329 (8th Cir. 1980)(anti-trust laws held not preempted by Communications Act.)

dominates the field of telecommunications regulation, the savings clause of the Communications Act negates the inference that Congress "left no room" for state causes of action. Cf. International Paper Company, 107 S.Ct. at 812. Rather, the concerns of federal policy are limited to supervision of the quality and rates of interstate service, leaving parties free to address other concerns under state law so long as compliance with both state and federal law is possible, and the vindication of such claims does not interfere with the accomplishment of the purposes and objectives of Congress.

In Nader v. Allegheny Airlines, Inc., the Court applied precisely this test to facts nearly identical to those of this case when it considered the preemptive effect of the Federal Aviation Act. After being "bumped" from an

overbooked flight, the plaintiff in Nader sued the airline for fraudulent misrepresentation. Like SPEAKERS in this case, he did not challenge the quality of or charges for the airline's service, but complained instead of its failure to disclose to him in advance of the sale of his ticket that its flights were systematically overbooked.

The airline moved to dismiss on the ground that the FAA had conferred primary jurisdiction over such claims on the Civil Aeronautics Board ("CAB"). The Court disagreed. Noting both the stated purpose of the FAA to promote "adequate, economical and efficient service... at the lowest cost," and the FAA's savings clause (virtually identical to Section 414 of the Communications Act),[10] the

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[10]It provides that "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing by common law or by statute, but

Court concluded that Congress intended that common law or statutory claims survive absent irreconcilable conflict with the federal statutory scheme. Notwithstanding the explicit statutory authority of the Civil Aeronautics Board ("CAB") to investigate "unfair or deceptive practices" and a then on-going rulemaking proceeding concerning the very overbooking practices as to which the plaintiff alleged he was defrauded, the Court found that no such conflict existed. It explained:

> There is no [CAB] requirement that air carriers engage in overbooking or that they fail to disclose that they do so. Any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would merely be incidental. Under the circumstances, the common-law action and the statute are not "absolutely inconsistent" and may coexist, as

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the provisions of this chapter are in addition to such remedies." 49 U.S.C. Sec. 1506.

> contemplated by the [savings clause].

426 U.S. 300.[11]

The Court's reasoning in Nader is fully applicable here. The FCC does not require that telephone companies bill for uncompleted calls, or that they fail to

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[11] US Tel seeks to distinguish Nader on the ground that the CAB, unlike the FCC, has no authority to entertain private claims or grant private remedies. It relies on United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474 (1932), to argue that since the Communications Act provides a remedial scheme for private complaints, and authorizes the FCC to prescribe as well as prohibit carriers' conduct, its jurisdiction over private claims is exclusive.

The distinction does not square with Court's analysis of the Cunard decision in Nader. In Cunard, an antitrust action was dismissed on primary jurisdiction grounds because initial consideration by the Interstate Commerce Commission had not been sought. As the Court observed in Nader, however, the plaintiff's antitrust claims were covered by unambiguous provisions of the Shipping Act which explicitly exempted affected shipping companies from the operation of the antitrust laws. 462 U.S. at 301. In the instant case, no exemption immunizing carriers from state law liability is present.

disclose that they do so. Indeed, the FCC has stated its view that disclosure to customers would be beneficial. See Bill Correctors, Ltd. v. United States Transmission Systems, Inc., et al., ("Bill Correctors") FCC Dkt. No. E-84-11 (Released: November 8, 1984), paras. 8-9. Any impact on the quality of services or the rates for those services that could result from the imposition of state law would be incidental at most. Thus, SPEAKERS' state law claims are not "absolutely inconsistent" with the Communications Act, and may easily coexist with it as contemplated by the savings clause.

III.

THE CONCLUSION THAT SPEAKERS' CLAIMS ARE NOT SUBJECT TO THIS FCC PRIMARY JURISDICTION IS CONSISTENT WITH NADER

The rejection by the Court below of US Tel's primary jurisdiction argument is also consistent with Nader, in which this

Court rejected the airline's contention that the doctrine of primary jurisdiction required referral of the plaintiff's claims to the CAB to permit it to determine whether its overbooking practice was "deceptive" within the meaning of the FAA. This Court held:

> Referral of the misrepresentation issue to the Board cannot be justified by the interest in informing the court's ultimate decision with "the expert and specialized knowledge," of the Board. The action brought by petitioner does not turn on a determination of the reasonableness of a challenged practice - a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry. The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case.

462 U.S. at 305-6 (citations omitted). Here, SPEAKERS' claims do not turn on a determination of the <u>reasonableness</u> of

US Tel's billing practices, as to which evaluation of economic and technical considerations might come into play. Rather, the standards implicated by its action for fraud are well within the conventional competence of the state court.

IV.

THE FCC'S RULINGS DO NOT CONFLICT WITH THE DECISION OF THE COURT BELOW

Finally, US Tel argues that the FCC's recent decision in Allnet, supra, preempts SPEAKERS' state-law claims. Contrary to US Tel's assertion, the allegations rejected by the FCC in that decision were not identical to those made here. The FCC charges focused on the charges imposed by various named carriers, rather than the carriers' fraudulent failure to disclose those charges in advance. They alleged simply "that each [complainant] purchased

telecommunications services from one or more of the defendant carriers and each has been overcharged for some of those services," and they sought "refund of the overcharges and relief from the practices leading to the overcharges." Allnet at para. 1.

Thus, unlike the claims in the instant case, the administrative charges in Allnet were well within the scope of the agency's primary concerns. But even if they had been otherwise, their rejection by an unreviewed ruling of an administrative agency would hardly give rise to a level of conflict that would warrant this Court's review.

In any event, the FCC ruling creates no conflict with SPEAKERS' state court claims. In its earlier ruling in Bill Correctors supra, to which the Allnet decision refers, the agency expressed its

views on the value of disclosure, stating:

> [W]e believe that the consumer, if provided with information as to each carrier's charging practices, can determine whether the service adequately protects against unreasonable overcharges. Customers informed of their carrier's charging practices can best evaluate whether a particular service meets their needs in the competitive marketplace... Therefore, we believe it is beneficial to make customers aware of the practices the carriers employ to guard against inadvertent overcharging resulting from the current deficiencies in the interexchange arrangements of local exchange carriers.

Bill Correctors at paras. 8-9, (emphasis supplied). If anything, these comments demonstrate that SPEAKERS' claims are fully consistent with federal policy, and negates any suggestion of conflict between those claims and the purposes or enforcement of the Communications Act.

CONCLUSION

The savings clause of the Communications Act negates any inference

that Congress intended to preempt all state law claims against telecommunications carriers. The Act is directed not to setting standards for advertising, but rather to ensuring the availability of quality communications services at reasonable rates. There is no possible conflict, therefore, between the federal law and SPEAKERS' claims of common law and statutory fraud.

Moreover, given the unrelatedness of those claims to the technical mission of the FCC, there is no ground for dismissal of SPEAKERS' claims as subject to the primary jurisdiction of the FCC. Their resolution will require none of the agency's technical expertise and is well within the conventional competence of the state court.

Accordingly, there is no reason for the Court to concern itself now with this case. The effect of the present

litigation on federal regulation of the telecommunications industry will be, at the very most, incidental. Nader, 426 U.S. at 300. Petitioner has made no showing otherwise. It has also failed to demonstrate any conflict within the meaning of the Supreme Court Rule 17, or to substantiate its claims about the doctrinal and practical importance of this case which is wholly peripheral to any vital issue that might attract Court's concern.

WHEREFORE, SPEAKERS respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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